No. 18-6210	
Title:	**Gerald P. Mitchell, Petitioner** **v.** **Wisconsin**
Docketed:	October 4, 2018
Lower Ct:	Supreme Court of Wisconsin
Case Numbers:	(2015AP304)
Decision Date:	July 3, 2018
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Oct 01 2018	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due November 5, 2018) **Motion for Leave to Proceed in Forma Pauperis** **Petition** **Appendix** **Proof of Service**
Oct 16 2018	Motion to extend the time to file a response from November 5, 2018 to December 5, 2018, submitted to The Clerk. **Main Document**
Oct 18 2018	Motion to extend the time to file a response is granted and the time is extended to and including December 5, 2018.
Dec 05 2018	Brief of respondent Wisconsin in opposition filed. **Main Document** **Proof of Service**
Dec 19 2018	Reply of petitioner Gerald P. Mitchell filed. (Distributed) **Other** **Main Document** **Proof of Service**
Dec 20 2018	DISTRIBUTED for Conference of 1/4/2019.
Jan 07 2019	DISTRIBUTED for Conference of 1/11/2019.
Jan 11 2019	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Feb 11 2019	SET FOR ARGUMENT on Tuesday, April 23, 2019
Feb 18 2019	Blanket Consent filed by Petitioner, Gerald P. Mitchell. **Blanket Consent**

Feb 18 2019	Blanket Consent filed by Respondent, Wisconsin **Blanket Consent**
Feb 25 2019	Joint appendix filed. **Main Document** **Proof of Service**
Feb 25 2019	Brief of petitioner Gerald P. Mitchell filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 26 2019	Brief amicus curiae of California DUI Lawyers Association filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 01 2019	Brief amicus curiae of National College for DUI Defense, Inc. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 04 2019	Supplemental proof of service of amicus California DUI Lawyers Association filed. **Main Document**
Mar 04 2019	Brief amici curiae of The Rutherford Institute and the Cato Institute filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 04 2019	Brief amicus curiae of Restore the Fourth, Inc. filed. **Main Document** **Certificate of Word Count** **Certificate of Word Count**
Mar 04 2019	Brief amici curiae of The DKT Liberty Project, Reason Foundation, and The Due Process Institute filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 04 2019	Brief amici curiae of the American Civil Liberties Union and ACLU of Wisconsin filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Mar 04 2019	Brief amicus curiae of DUI Defense Lawyers Association filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 20 2019	CIRCULATED
Mar 27 2019	Brief of respondent Wisconsin filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 03 2019	Brief amici curiae of National Conference of State Legislatures, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 03 2019	Brief amicus curiae of Mothers Against Drunk Driving filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**

Apr 03 2019	Brief amici curiae of League of Wisconsin Municipalities, et al. filed. (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Apr 03 2019	Brief amici curiae of State of Colorado, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 16 2019	Reply of petitioner Gerald P. Mitchell filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 23 2019	Argued. For petitioner: Andrew R. Hinkel, Assistant State Public Defender, Madison, Wis. For respondent: Hannah S. Jurss, Assistant Attorney General, Madison, Wis.
Jun 27 2019	Judgment VACATED and case REMANDED. Alito, J., announced the judgment of the Court and delivered an opinion, in which Roberts, C. J., and Breyer and Kavanaugh, JJ., joined. Thomas, J., filed an opinion concurring in the judgment. Sotomayor, J., filed a dissenting opinion, in which Ginsburg and Kagan, JJ., joined. Gorsuch, J., filed a dissenting opinion.

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No.

IN THE

Supreme Court of the United States

GERALD P. MITCHELL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court of Wisconsin

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In both *Missouri v. McNeely* and *Birchfield v. North Dakota*, this Court referred approvingly to "implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply" with tests for alcohol or drugs when they have been arrested on suspicion of driving while intoxicated. 569 U.S. at 141, 161 (2013); 136 S. Ct. 2160, 2185 (2016). But a majority of states, including Wisconsin, have implied-consent laws that do something else entirely: they authorize blood draws without a warrant, without exigency, and without the assent of the motorist, under a variety of circumstances—most commonly when the motorist is unconscious. State appellate courts have sharply divided on whether such laws comport with the Fourth Amendment.

The question presented is:

Whether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement.

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OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin (App., *infra*, 1a-57a) is reported at 914 N.W.2d 151. The certification of the case to that court by the state court of appeals (App., *infra*, 58a-71a) is unreported. The opinion of the circuit court (App., *infra*, 72a-125a) is unreported.

JURISDICTION

The Supreme Court of Wisconsin issued its decision on July 3, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Wisconsin Stat. § 343.305(3)(b) provides: "A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection, and if a law enforcement officer has probable cause to believe that the person has violated s. 346.63 (1), (2m) or (5) or a local ordinance in conformity therewith, or s. 346.63 (2) or (6) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, or detects any

presence of alcohol, controlled substance, controlled substance analog or other drug, or a combination thereof, on a person driving or operating or on duty time with respect to a commercial motor vehicle or has reason to believe the person has violated s. 346.63 (7), one or more samples specified in par. (a) or (am) may be administered to the person."

STATEMENT

Without obtaining a warrant, police directed the taking of petitioner's blood while he was unconscious following his arrest for driving while intoxicated. There was no evidence of any exigency preventing the police from obtaining a warrant, and the state has disclaimed any reliance on the exigency exception to the warrant requirement.

Instead, the state relied on Wis. Stat. § 343.305(3)(b). That statute, part of Wisconsin's implied-consent law, allows the taking of a person's blood if the person is unconscious and the police have probable cause to suspect drunk driving.

Petitioner challenged the warrantless blood draw as contrary to the Fourth Amendment, but a divided Supreme Court of Wisconsin found no constitutional violation. The court could not agree on a rationale, however. Three justices would have held that the state's implied-consent law, by "deeming" motorists to have consented, supplies actual, constitutional consent to the taking of blood—that is, the implied-consent law is itself an exception to the warrant requirement. Two concurring justices opined that "the state can[not] waive the people's constitutional protections against the state" but nevertheless upheld the blood draw on the theory

that a blood draw from an unconscious drunk-driving suspect is, categorically, a lawful search incident to arrest. (The justices reached this conclusion despite this Court's holding, in *Birchfield*, that while breath tests are valid searches incident, blood draws are not. 136 S. Ct. at 2184 (2016).) Two dissenting justices agreed with the concurrence that statutes cannot "deem" constitutional consent into existence, but rejected the concurrence's search-incident theory. They would have suppressed the blood draw evidence.

The Wisconsin court's divisions reflect a nationwide controversy. Provisions like Wisconsin's are widespread: twenty-nine states have laws sanctioning warrantless blood draws from unconscious intoxicated driving suspects.[1] Since

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[1] *See* ALA.CODE 1975 § 32-5-192 (b); ALASKA STAT. § 28.35.035 (b); ARIZ. REV. STAT. ANN. § 28-1321 C; ARK. CODE ANN. § 5-65-202 (b); CAL. VEH. CODE § 23612(a)(5); COLO. REV. STAT. § 42-4-1301.1(8); FLA. STAT. § 316.1932(1)(c); GA. CODE ANN. § 40-5-55 (b); 625 ILL. COMP. STAT. 5/11-501.1 (b); IOWA CODE § 321J.7; KY. REV. STAT. ANN. § 189A.103(2); LA. REV. STAT. ANN. § 32:661 B; MD. CODE ANN., CTS & JUD. PROC. § 10-305 (c); MO. REV. STAT. § 577.033; MONT. CODE. ANN. 61-8-402 (3); NEV. REV. STAT. § 484C.160; N.H. REV. STAT. ANN. § 265-A:13; , N.M. STAT. ANN. § 66-8-108; N.C. GEN. STAT. § 20-16.2(b); OHIO REV. CODE ANN. § 4511.191 (4); OKLA. STAT. TIT. 47, §751; ORE. REV. STAT. § 813.140; S.C. CODE ANN. § 56-5-2950 (H); TEX. TRANSP. CODE ANN. § 724.014 (WEST); UTAH CODE ANN. § 41-6a-522; VT. STAT. ANN. § 1202 (a) (2); W. VA. CODE, § 17C-5-7 (a); WIS. STAT. § 343.305(3)(b); WYO. STAT. ANN. 1977 § 31-6-102 (c).

McNeely revived the warrant requirement for drunk-driving blood draws, seven states' appellate courts have struck down such provisions. Another seven states have struck down or limited related implied-consent provisions, or declared that such statutes cannot substitute for voluntary consent as an exception to the warrant requirement. On the other hand, six states (excluding Wisconsin) have held that implied-consent laws provide blanket Fourth Amendment consent to the taking of blood, so that neither a warrant nor exigent circumstances are required.

This case is an opportunity for the Court to resolve an important constitutional question: can state legislatures obviate the warrant requirement by "deeming" their citizens to have consented to Fourth Amendment searches?

A. Factual Background

In May of 2013, petitioner Gerald P. Mitchell was arrested for operating while intoxicated. App., *infra*, 2a-3a. Officers took him first to the police station, but on the way there he became lethargic, and the police determined a breath test wouldn't be feasible. *Id.* at 5a. So, they took him to a hospital, where an officer read him a statutorily mandated form regarding the implied-consent law. *Ibid.* Petitioner was too incapacitated to indicate whether he consented or not, and was soon unconscious. His blood was drawn about an hour after his arrest. *Id.* at 6a. No warrant was sought. *Id.* at 5a.

B. Procedural Background

Petitioner was charged with operating while intoxicated and with a prohibited alcohol

concentration. App., *infra*, 6a. He moved to suppress the blood test results on the ground that his blood was taken without a warrant and without exigent circumstances. *Ibid.* The state agreed there was no exigency, but argued that, by operation of statute, petitioner had consented to the test by driving, and had not withdrawn his consent. *Id.* at 4a, 117a. The trial court upheld the search, relying on the implied-consent statute. *Id.* at 4a, 121a-23a. The state introduced the test results at petitioner's jury trial, and he was convicted of both counts. *Id.* at 4a-5a.

Petitioner appealed the suppression decision, and the court of appeals certified the case to the Supreme Court of Wisconsin, noting a single issue: "whether the warrantless blood draw of an unconscious motorist pursuant to Wisconsin's implied consent law, where no exigent circumstances exist or have been argued, violates the Fourth Amendment." App., *infra*, 58a. It explained that while this Court has "referred approvingly [to] the general concept of implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply... it has yet to decide whether the 'implied consent' that flows from a statutory scheme constitutes actual Fourth Amendment consent." *Id.* at 63a-64a. It observed that some state courts have "concluded that statutory implied consent satisfies the Fourth Amendment" while others "have reasoned that such implied consent is a legal fiction that does not take into account the totality of the circumstances as required by" this Court, and so cannot sustain a warrantless search. *Id.* at 64a.

The Supreme Court of Wisconsin accepted certification. It ultimately upheld the search by a 5-2 vote, but there was no majority for any rationale.

One three-justice bloc analogized a person's decision to drive to entering one of the "pervasively regulated businesses [or] closely regulated industries" that are subject to certain warrantless searches. App., *infra*, 12a-13a; *see Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970). It went on to assert that, because *Birchfield* had approved civil penalties for refusing consent to a blood draw, it had also (silently) approved statutes legislating consent into existence: "because it is constitutionally permissible to impose civil penalties as a consequence for refusing to submit to a blood draw... Wisconsin's implied-consent statutes... describe a context consistent with Birchfield where constitutionally sufficient consent to search arises through conduct." App., *infra*, 18a-19a.

Two concurring justices, in an opinion authored by Justice Daniel Kelly, "incorporate[d] in toto" his analysis from a prior case, *State v. Brar*, 898 N.W.2d 499 (Wis. 2017). App., *infra*, 34a-35a. In that case, he had refused to join the same three-justice bloc noted above because its discussion "misunderstands how our implied consent law functions, [saying] 'consent' implied by law is something voluntarily given when such a thing is impossible, [and] introduces a destructive new doctrine that reduces constitutional guarantees to a matter of legislative grace." *Brar*, 898 N.W.2d at 511.

Justice Kelly went on, in Brar, to call it

> a metaphysical impossibility for a driver to freely and voluntarily give "consent" implied by law. This is necessarily so because "consent" implied by law isn't given by the driver. If it is given by anyone, it is given by the legislature through the legal fiction of "deeming."... One only "deems" when the thing deemed did not really happen, but you intend to act as though it did. So it makes no sense to ask if the driver freely and voluntarily gave something he manifestly did not give in the first place.

Id. at 515-16.

Nevertheless, in the concurring opinion in *this* case, Justice Kelly held the blood draw constitutional even in the absence of actual consent. Though it is not completely clear, he appeared to conclude the taking of blood was a valid search incident to arrest, relying on his reading of *Birchfield*, *McNeely*, and *Schmerber v. California*, 384 U.S. 757 (1966). App., *infra*, 38a-42a.

Regarding the dissent's observation that *Birchfield* had said, regarding unconscious motorists, "the police may apply for a warrant if need be," Justice Kelly responded that *Birchfield*'s "central logic is actually self-contradictory" and that the Court had spoken "with two contradictory voices in one opinion" such that "the best we can do is follow its logic until it starts contending with itself." App., *infra*, 42a.

Finally, two justices dissented in an opinion by Justice Ann Walsh Bradley. The dissenters would have held that "'implied consent' is not the same as 'actual consent' for purposes of a Fourth Amendment search" and said by concluding otherwise, the lead

opinion would "create a statutory per se exception to the ... warrant requirement." App., *infra*, 47a.

REASONS FOR GRANTING THE PETITION

I. State appellate courts are deeply divided on whether implied-consent laws create an exception to the warrant requirement

As noted above, twenty-nine states have "unconscious clauses" in their implied-consent laws. Appellate courts in seven states have held such clauses inconsistent with the Fourth Amendment. Courts in seven other states have ruled that different, but related, provisions of their implied-consent laws violated the Constitution in the same way: by authorizing blood draws regardless of a motorist's actual consent. On the other hand, the appellate courts of seven states have held that implied-consent laws supply actual, Fourth Amendment consent, such that police may take a suspected motorist's blood with no warrant, even in the absence of exigent circumstances.

A. Seven state appellate courts have held that provisions for warrantless blood draws of unconscious motorists are unconstitutional

Courts in Arizona, California, Georgia, Kansas, North Carolina, Pennsylvania and Texas have issued decisions that would have compelled a different result than the one the Wisconsin court reached. All have held that statutes purporting, in the name of "implied consent," to allow warrantless blood draws from unconscious motorists are unconstitutional.

Some courts have reasoned that blanket legislative declarations of "consent" simply have nothing to do with the individual, factual, voluntary consent this Court has established as a warrant exception. That is, equating the two is simple linguistic conflation—wordplay. Or, as the court said in *People v. Arredondo*, "A state legislature does not have the power to 'deem' into existence 'facts' operating to negate individual rights arising under the federal constitution." 199 Cal. Rptr. 3d 563, 574, (Cal. Ct. App. 2016), *rev'w granted and opinion superseded*, 371 P.3d 240 (Cal. 2016).

The *Arredondo* court called "implied consent" "a misleading, if not inaccurate, label in this context. Certainly consent sufficient to sustain a search may be 'implied' as well as explicit, but it is nonetheless *actual* consent, 'implied' only in the sense that it is manifested by *conduct* rather than words." *Id.* at 571 (emphasis in original). "Nothing here resembles this 'implied consent.' The mere operation of a motor vehicle is not a manifestation of *actual* consent to a later search of the driver's person. To declare otherwise is to adopt a construct contrary to fact." *Id.* (emphasis in original).

This was especially true, said the court, of drivers from out of state who happened to cross into California. "These drivers cannot be argued to have consented in fact to a search of their persons. They have not been asked to agree, or told that they have a choice, or apprised of the consequences that will flow from their conduct.... The statute makes their conduct the legal equivalent of consent regardless of their knowledge, intentions, or understanding." *Id.* at 573.

Likewise in *Williams v. State*, the Supreme Court of Georgia held that "mere compliance with statutory implied consent requirements does not, per se, equate to actual, and therefore voluntary, consent on the part of the suspect so as to be an exception to the constitutional mandate of a warrant." 771 S.E.2d 373, 377 (Ga. 2015). Following *Williams*, the court of appeals applied this rule in *Bailey v. State*, holding a driver's "implied consent was insufficient to satisfy the Fourth Amendment, and he could not have given actual consent to the search and seizure of his blood and urine, as he was unconscious." 790 S.E.2d 98, 104 (Ga. Ct. App. 2016), *overruled on other grounds by Welbon v. State*, 799 S.E.2d 793 (Ga. 2017).

Relatedly, several courts have noted that these statutes deem searches "consensual" without requiring any assessment of whether a motorist's supposed consent is voluntary under the "totality of all the circumstances," as this Court has long required. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). Thus, the Supreme Court of North Carolina: "[t]reating [the statute] as an irrevocable rule of implied consent does not comport with the consent exception to the warrant requirement because such treatment does not require an analysis of the voluntariness of consent based on the totality of the circumstances." *State v. Romano*, 800 S.E.2d 644, 652 (N.C. 2017).

The Texas high court employed the same reasoning in *State v. Villarreal*, saying implied consent as a warrant exception cannot "be squared with the requirement that, to be valid for Fourth Amendment purposes, consent must be freely and voluntarily given based on the totality of the

circumstances, and must not have been revoked or withdrawn at the time of the search." 475 S.W.3d 784, 800 (Tex. Crim. App. 2014). (*Villareal* did not concern an unconscious motorist; the subsequent case of *State v. Ruiz* did, and the court reached the same result. 545 S.W.3d 687, 693 (Tex. App. 2018), *review granted* (Apr. 25, 2018).) *See also State v. Dawes*, No. 111310, 2015 WL 5036690, slip op. at 5 (Kan. Ct. App. Aug. 21, 2015) (under implied-consent statute, officer contemplates only certain statutory facts, rather than "the rest of what was going on ... 'the totality of the circumstances'").

And, in *Commonwealth v. Myers*, the Supreme Court of Pennsylvania interpreted that state's implied-consent statute not to authorize blood draws from unconscious motorists. 164 A.3d 1162, 1172 (Pa. 2017). However, it went further, saying that if it *had* interpreted the statute this way, it would be unconstitutional, because such "consent" does not satisfy the requirement that "voluntariness is evaluated under the totality of the circumstances." *Id.* at 1176.

Courts have also observed that implied-consent statutes authorizing blood draws create *per se*, categorical exceptions to the warrant requirement—a species of exception this Court has repeatedly rebuffed, most recently in *McNeely*, 569 U.S. at 158. Thus, per the North Carolina court:

> [I]n *McNeely*, though [it] only specifically addressed the exigency exception to the warrant requirement, the Court spoke disapprovingly of per se categorical exceptions to the warrant requirement, *id.* ("While the desire for a bright-line rule is understandable, the Fourth Amendment will not tolerate adoption of an overly

> broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake.... [A] case-by-case approach is hardly unique within our Fourth Amendment jurisprudence.").

Romano, 800 S.E.2d at 653 (citations omitted); see also *Dawes*, No. 111310, 2015 WL 5036690, slip op. at 5 (informed-consent statutes create "a categorical exception to the warrant requirement, and they accordingly run afoul of the ruling in *McNeely*"); *State v. Havatone*, 389 P.3d 1251, 1255 (Ariz. 2017), ("unconscious clause" could not support a blood draw absent "case-specific exigent circumstances").

B. Courts in seven other states have held that implied-consent laws do not supply the consent required by the Fourth Amendment

Though Petitioner has not counted them among the seven states squarely holding implied-consent statutes cannot validate a warrantless blood draw from an unconscious motorist, seven other jurisdictions have concluded, in other contexts, that implied-consent statutes cannot supply the voluntary consent the Fourth Amendment requires.

For example, South Dakota's implied-consent law simply authorizes the taking of blood: conscious or not, a motorist has no opportunity under the statute to refuse. S.D. CODIFIED LAWS § 32-23-10. So in *State v. Fierro*, a case involving a conscious motorist who did not, factually, consent to a blood draw, the Supreme Court of South Dakota held the law unconstitutional because it authorized "consent" searches where actual, "free and voluntary consent" was absent. 853 N.W.2d 235, 241 (S.D. 2014).

Similar results were had in *People v. Turner*, 97 N.E.3d 140, 152 (Ill. App. Ct. 2018) and *Byars v. State*, 336 P.3d 939, 946 (Nev. 2014).

Other courts have struck down statutory provisions authorizing implied-consent blood draws before going on to consider whether, under the totality of the circumstances, the driver actually gave voluntary consent. *Flonnory v. State*, 109 A.3d 1060, 1065 (Del. 2015); *State v. Pettijohn*, 899 N.W.2d 1, 26–27 (Iowa 2017) ("[T]he clear implication of the *McNeely* decision is that statutorily implied consent to submit to a warrantless blood test under threat of civil penalties for refusal to submit does not constitute consent for purposes of the Fourth Amendment."); *State v. Modlin*, 867 N.W.2d 609, 619 (Neb. 2015).

Finally, one court, faced with a statute that facially authorized blood draws without regard to actual consent, found the blood draw at issue unlawful but refrained from invalidating the statute, deciding instead that the its language could be read to authorize *warranted* searches. *State v. Wells*, No. M2013-01145-CCA-R9CD, 2014 WL 4977356, slip op. at 13, 19 (Tenn. Crim. App. Oct. 6, 2014).

C. Six states (again excluding Wisconsin) have held that implied-consent laws constitute an exception to the warrant requirement, at least with respect to unconscious drivers

In contrast to the decisions discussed above, other states' courts have determined that implied-consent laws can provide a *per se* exception to the warrant requirement. These courts' analyses have

typically viewed *Birchfield* as blessing (or at least not forbidding) this conclusion.

The most cited of these decisions is *People v. Hyde*, 393 P.3d 962 (Colo. 2017), another case involving an unconscious motorist. There, the supreme court relied on *Birchfield*'s sanctioning of "the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws, *and nothing we say here should be read to cast doubt on them.*" *Hyde*, 393 P.3d at 968 (emphasis added by Colorado court) (citing *Birchfield*, 136 S.Ct. at 2185).

The court allowed that *Birchfield* had rejected implied-consent laws imposing criminal penalties for refusal, but noted that Colorado's imposed only civil ones. From this, the court concluded (without further explanation) that because legislatures may levy civil penalties on motorists who refuse a blood draw, they may also simply *authorize* such blood draws, regardless of actual consent. *Id.* (The Court of Appeals of Virginia took the same route on the way to announcing an "implied consent exception to the search warrant requirement." *Wolfe v. Commonwealth*, 793 S.E.2d 811, 814-15 (Va. Ct. App. 2016).).

In a discussion echoed by the three-justice lead opinion in petitioner's case, App., *infra*, 10a-13a, three concurring justices in *Hyde* noted *Birchfield*'s reference to *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). *Hyde*, 393 P.3d at 971-72 (Eid, J., concurring) (citing *Birchfield*, 136 S. Ct. at 2185). From this one citation, the concurrence went on to equate driving on a road to operating a "highly regulated business[]"

such that a driver's voluntary consent could be inferred from "context." *Id.* The Florida appellate court cited both *Hyde*'s majority and its concurrence with approval, and reached the same result. *McGraw v. State*, 245 So. 3d 760, 767 (Fla. Dist. Ct. App. 2018), *review granted*, No. SC18-792, 2018 WL 3342880 (Fla. July 9, 2018).

Three other courts have raised distinct rationales for allowing warrantless searches pursuant to implied-consent statutes. First, the high court of Oklahoma held that its statute—which authorized warrantless blood draws only in cases of an accident involving death or great bodily injury—created an acceptable *per se* exigency, as distinct from the *per se* exigency this Court rejected in *McNeely*. *Cripps v. State*, 387 P.3d 906, 909 (2016), *cert. denied*, 137 S. Ct. 2186, (2017).

Meanwhile the Court of Appeals of Ohio, in *State v. Speelman*, said (like the concurrence in this case below, App., *infra*, 42a-44a) that a blood draw from an unconscious motorist was a valid search incident to arrest, despite *Birchfield*'s holding that blood draws are not. 102 N.E.3d 1185, 1188 (Ohio Ct. App. 2017). The court opined that the *Birchfield* Court assumed the existence of the less-invasive breath test, which is unavailable when a motorist is unconscious. *Id.*

Finally, the Idaho Court of Appeals held that under its implied-consent law, a motorist's operation on Idaho highways supplied actual, constitutional consent. That state's supreme court had earlier applied a saving construction to the statute—it read it to permit a motorist to withdraw consent, though there was no such provision in the statute's text.

Bobeck v. Idaho Transp. Dep't, 363 P.3d 861, 866 (Idaho Ct. App. 2015) (citing *State v. Halseth*, 339 P.3d 368, 371 (Idaho 2014) and *State v. Arrotta*, 339 P.3d 1177, 1178 (Idaho 2014)). The court of appeals held that, since the unconscious motorist obviously did not actually withdraw this consent, her warrantless blood draw was constitutional. *Bobeck v. Idaho Transp. Dep't*, 363 P.3d 861, 867 (Ct. App. 2015).

II. The decision below is wrong

Certiorari is also warranted because the decision below is not compatible with this Court's precedent. Though the Wisconsin court did not reach a majority for any rationale, the *result* it reached can't be sustained on any theory. By sanctioning a statutory declaration that a particular class of searches necessarily passes constitutional scrutiny, the Wisconsin court, and others like it, are permitting (and inviting) legislatures to carve out a new Fourth Amendment exception of "deemed consent."

Though "implied-consent" statutes have "consent" in the name, what they prescribe in cases like this one has nothing to do with the "voluntary consent" that this Court has established as an exception to the warrant requirement. "Voluntary consent" is a choice made by a person the police wish to search—a "free and unconstrained" choice, as demonstrated by the "totality of all the circumstances." *Schneckloth*, 412 U.S. at 225, 227. As many courts have observed, implied-consent statutes don't just dispense with the totality of the circumstances: they give the suspect motorist no choice at all. Such statutes' only link to the notion of

"consent" is a sort of rhetorical gesture toward the concept: a declaration that a certain class of people—motorists—are "deemed to have given consent" to having their blood taken. But this declaration—what the California court called "imputed" consent—is manifestly not a choice by the motorist: it is a choice by the legislature. *Arredondo*, 199 Cal. Rptr. 3d at 571.

A state legislature is not free to extinguish rights granted by the Constitution. And it is clear that, *contra* some state courts, a motorist does have a Fourth Amendment right to refuse a blood draw, absent a warrant or exigency. Some state court opinions blessing implied-consent blood draws have claimed to the contrary, citing *South Dakota v. Neville*, 459 U.S. 553 (1983). *Neville* did say that "a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test," *id.* at 560 n.10, but it was talking about the *Fifth* Amendment, not the Fourth. As this Court said in *Skinner v. Railway Labor Executives' Ass'n*, "a compelled intrusio[n] into the body for blood to be analyzed for alcohol content must be deemed a Fourth Amendment search." 489 U.S. 602, 616 (1989). And, of course, what the Fourth Amendment says about searches is that the people have the right to "be secure ... against" them—i.e., to *refuse* them.

The Court removed any doubt about this right in *McNeely*. In holding that blood draws of suspected drunk drivers would not always fall within the exigency exception, *McNeely* presupposed that, to be permissible, blood draws would *need* to satisfy a warrant exception. This is only true, of course, if the

Fourth Amendment generally forbids them, absent a warrant.

Nor (as some state courts have also suggested) did *Birchfield* sanction warrantless searches like the one here. When *Birchfield* spoke favorably of implied-consent laws, it was talking about a particular variety: "implied-consent laws that *impose civil penalties and evidentiary consequences on motorists who refuse to comply.*" 136 S. Ct. at 2185 (emphasis added). Such laws are, of course, completely different from the widespread provisions that permit the taking of blood without a warrant. Rather than imposing civil penalties for refusing to comply, these statutes outright deny the motorist the *ability* to refuse.

And it's not at all convincing to claim, like the Colorado court and the plurality in this case, that *Birchfield*'s approval of civil penalties for refusal (as opposed to criminal ones, which it held unconstitutional) means that states imposing only civil penalties for refusal are also free to dispense altogether with the *possibility* of refusal. *Mitchell*, 914 N.W.2d at 160 (App., *infra*,, 15a); *Hyde*; 393 P.3d at 968. In fact, *Birchfield* strongly implies the opposite: if criminal penalties for refusal are unlawful because they too heavily burden the exercise of the Fourth Amendment right to refuse a blood test, can it really be that the state can outright *abolish* the very same right?

But *Birchfield* did more than just imply this conclusion. Addressing North Dakota's argument that blood tests were indispensible law enforcement tools (and thus valid searches incident to arrest) because they, unlike breath tests, could be performed

on unconscious motorists, the Court said: "we have no reason to believe that such situations are common in drunk-driving arrests, *and when they arise, the police may apply for a warrant if need be. Id.* at 2184-85 (emphasis added).

Per the Wisconsin court, and several others, in the very situation *Birchfield* described, there is actually no "need" at all for the police to "apply for a warrant." They can simply rely on legislative declarations that motorists are "deemed" to have consented to warrantless searches, whether they actually consent or not. This holding is irreconcilable with *McNeely* and with *Birchfield*. In declaring that the government may waive the citizen's rights against the government, it drains the constitutional (and indeed, the commonsensical) notion of consent of all meaning. It is wrong, and this Court ought to correct it.

III. The question presented is important, and this case presents an ideal vehicle for deciding it

As Petitioner showed above, the question presented, and closely related questions, have arisen in the courts of about twenty states. Those courts have given directly contradictory answers. For this reason alone, the question is an important one for this Court to address. If it does not, citizens of around half of the states will continue to be subject to statutes allowing the taking of their blood without a warrant, without exigency, and whether they agree or not.

Though petitioner can locate no statistics on the annual number of warrantless, non-consensual blood

draws conducted under implied-consent statutes, the Federal Bureau of Investigation reports there were nearly one million arrests for driving under the influence in 2017. Crime in the United States 2017, Table 29, available at https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-29. Given that around thirty states have implied-consent laws permitting warrantless blood draws under some circumstances, it stands to reason that thousands of motorists are subjected to warrantless, non-exigent, factually non-consensual searches every year.

If, as petitioner maintains and many courts have held, such searches are unconstitutional, then these motorists are being subjected, by their courts and legislatures, to systematic Fourth Amendment violations—specifically, warrantless government intrusions into their bodies. The situation merits this court's attention.

And this case is an ideal vehicle to address it. First, the constitutional question was squarely presented in the Supreme Court of Wisconsin (though that court could not find a majority for any holding on it). Its resolution is also dispositive of petitioner's suppression motion: the state has never claimed exigent circumstances as an alternative ground to uphold the blood draw and, in fact, the record reveals no such exigency. The facts and posture of this case thus provide an excellent opportunity to decide whether a state legislature, by means of an implied-consent law, may "deem" a warrantless search lawful under the Fourth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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October 1, 2018

APPENDIX

SUPREME COURT OF WISCONSIN

CASE NO.:	2015AP304-CR
COMPLETE TITLE:	State of Wisconsin, Plaintiff-Respondent, v. Gerald P. Mitchell, Defendant-Appellant.

ON CERTIFICATION FROM THE COURT OF APPEALS

OPINION FILED:	July 3, 2018
SUBMITTED ON BRIEFS:	
ORAL ARGUMENT:	April 11, 2018
SOURCE OF APPEAL:	
COURT:	Circuit
COUNTY:	Sheboygan
JUDGE:	Terence T. Bourke
JUSTICES:	
CONCURRED:	KELLY, J., concurs, joined by R.G. BRADLEY, J. (opinion filed).
DISSENTED:	A.W. BRADLEY, J., dissents, joined by ABRAHAMSON, J. (opinion filed).
NOT PARTICIPATING:	

ATTORNEYS:

For the defendant-appellant, there were briefs filed by *Linda J. Schaefer* and *Schaefer Law Firm, S.C.*, Sturgeon Bay. There was an oral argument by *Linda J. Schaefer*.

For the plaintiff-respondent, there was a brief filed by *Ryan J. Walsh*, chief deputy solicitor general, with whom on the brief were *Brad D. Schimel*, attorney general, and *David H. Perlman*, assistant attorney general. There was an oral argument by *Ryan J. Walsh*, chief deputy solicitor general.

An amicus curiae brief was filed on behalf of Mothers Against Drunk Driving by *Kevin M. St. John* and *Bell Giftos St.*

John, LLC, Madison, with whom on the brief was *Theane D. Evangelis*, *Lauren M. Blas*, and *Gibson, Dunn & Crutcher, LLP*, Los Angeles, California. There was an oral argument by *Lauren M. Blas*.

2018 WI 84

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 2015AP304-CR
(L.C. No. 2013CF365)

STATE OF WISCONSIN : IN SUPREME COURT

State of Wisconsin,

Plaintiff-Respondent,

v.

Gerald P. Mitchell,

Defendant-Appellant.

FILED

JUL 3, 2018

Sheila T. Reiff
Clerk of Supreme Court

Appeal from a judgment of the Circuit Court. *Affirmed.*

¶1 PATIENCE DRAKE ROGGENSACK, C.J. This appeal is before us on certification from the court of appeals.

¶2 Gerald Mitchell was convicted of operating while intoxicated and with a prohibited alcohol concentration, based on the test of blood drawn without a warrant while he was unconscious, pursuant to Wis. Stat. § 343.305(3)(b) (2013-14).[1] Mitchell contends that the blood draw was a search conducted in violation of his Fourth Amendment rights.

[1] All subsequent references to the Wisconsin Statutes are to the 2013-14 version unless otherwise indicated.

¶3 We conclude that Mitchell voluntarily consented to a blood draw by his conduct of driving on Wisconsin's roads and drinking to a point evidencing probable cause of intoxication. Further, through drinking to the point of unconsciousness, Mitchell forfeited all opportunity, including the statutory opportunity under Wis. Stat. § 343.305(4), to withdraw his consent previously given; and therefore, § 343.305(3)(b) applied, which under the totality of circumstances herein presented reasonably permitted drawing Mitchell's blood. Accordingly, we affirm Mitchell's convictions.

I. BACKGROUND

¶4 On the afternoon of May 30, 2013, officers from the City of Sheboygan Police Department were dispatched in response to a report that the caller had seen Mitchell, who appeared intoxicated, get into a gray van and drive away. Between 30 and 45 minutes later, Officer Alex Jaeger made contact with Mitchell. He found Mitchell walking near a beach. Mitchell was wet, shirtless and covered in sand. Mitchell's speech was slurred and he had difficulty maintaining his balance.

¶5 Mitchell admitted to Jaeger that he had been drinking prior to driving and that he continued drinking at the beach. He also stated that he had parked his vehicle "because he felt he was too drunk to drive." Nearby, officers found the gray van Mitchell was reported to have been driving.

¶6 After observing Mitchell's physical condition, Jaeger believed that it would not be safe to conduct standard field sobriety tests. Instead, he administered a preliminary breath

test, which indicated a blood alcohol concentration (BAC) of 0.24.[2] Jaeger then arrested Mitchell for operating while intoxicated.

¶7 Following his arrest, and during the drive to the police station, Mitchell's physical condition deteriorated and his demeanor became more "lethargic." Upon arrival at the police station, it became apparent that an evidentiary breath test would not be feasible. Instead, Jaeger opted to transport Mitchell to a nearby hospital for a blood draw.

¶8 During the approximately eight-minute drive to the hospital, Mitchell "appeared to be completely incapacitated, [and] would not wake up with any type of stimulation." Upon arriving at the hospital, Mitchell needed to be transported in a wheelchair where he sat "slumped over" and unable to maintain an upright seating position.

¶9 After Mitchell entered the hospital emergency room, Jaeger read Mitchell the Informing the Accused form, thereby reading Mitchell the statutory opportunity to withdraw his consent to a blood draw. However, Mitchell was "so incapacitated [that] he could not answer." Jaeger directed hospital staff to draw a sample of Mitchell's blood.[3] They did so. Mitchell did not awaken during the procedure.

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[2] Preliminary breath tests are not sufficient evidence to prove prohibited alcohol concentrations at trial. Wis. Stat. § 343.303.

[3] There was no warrant sought prior to drawing Mitchell's blood.

¶10 The blood draw occurred approximately one hour following Mitchell's arrest. The analysis of his blood sample showed a BAC of 0.222.

¶11 Mitchell was subsequently charged with driving with a prohibited alcohol concentration (PAC), as well as operating a motor vehicle while intoxicated (OWI), as a 7th offense. Prior to trial, Mitchell moved to suppress the results of the blood test. He alleged that the warrantless blood draw violated his rights under the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution.

¶12 In response to Mitchell's motion, the State contended that he had consented to the blood draw when he drove his van on Wisconsin highways according to a subsection of Wisconsin's implied-consent law, Wis. Stat. § 343.305(2). The State also contended that as an unconscious person, he is presumed not to have withdrawn his consent, pursuant to § 343.305(3)(b). The State expressly stated that it was not relying on exigent circumstances to justify the blood draw.

¶13 The circuit court[4] denied Mitchell's suppression motion in reliance on Wis. Stat. § 343.305(3)(b). The circuit court concluded that the officer had probable cause to believe that Mitchell was driving while intoxicated, and therefore, the blood

[4] The Honorable Terence T. Bourke of Sheboygan County presided.

draw was lawful. A jury convicted Mitchell of the OWI and PAC charges.

¶14 Mitchell appealed his conviction based on the sole contention that the warrantless blood draw violated his Fourth Amendment right to be free from "unreasonable searches and seizures."

¶15 The court of appeals, noting the opportunity to clarify the law in light of our recent decision in State v. Howes, 2017 WI 18, 373 Wis. 2d 468, 893 N.W.2d 812,[5] certified the following questions: (1) whether "implied-consent," the potential for which is described in Wis. Stat. §§ 343.305(2) & (3)(a), which arises through a driver's voluntary conduct in operating a vehicle on Wisconsin roadways after drinking to intoxication, is constitutionally sufficient consent, and (2) whether a warrantless blood draw from an unconscious person pursuant to Wis. Stat. § 343.305(3)(b) violates the Fourth Amendment.

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[5] The court of appeals, noting that two of its prior cases had reached opposite conclusions, asked us to clarify whether implied consent is equivalent to constitutionally sufficient consent. Compare State v. Padley, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867 (holding that implied consent is not constitutionally sufficient consent), with State v. Wintlend, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745 (holding that implied consent is constitutionally sufficient). See also Cook v. Cook, 208 Wis. 2d 166, 171, 560 N.W.2d 246 (1997) (concluding that the court of appeals does not have the power to overrule or modify one of its published opinions).

II. DISCUSSION

A. Standard of Review

¶16 Whether a suppression motion was properly denied presents a question of constitutional fact. Howes, 373 Wis. 2d 468, ¶17 (citing State v. Tullberg, 2014 WI 134, ¶27, 359 Wis. 2d 421, 857 N.W.2d 120). We will not set aside a circuit court's findings of historical fact unless they are clearly erroneous. State v. Brereton, 2013 WI 17, ¶17, 345 Wis. 2d 563, 826 N.W.2d 369. However, the application of those facts to Fourth Amendment principles presents a question of law that we review independently. Id.

B. Fourth Amendment General Principles

¶17 The Fourth Amendment to the United States Constitution, and its Wisconsin counterpart, Article I, Section 11 of the Wisconsin Constitution,[6] protect persons' rights to "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV; Wis. Const. art. I, § 11. "As the text makes clear, the ultimate touchstone of the Fourth Amendment is reasonableness." Riley v. California, 573 U.S. ___, 134 S. Ct. 2473, 2482 (2014) (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006)). As a result, the Fourth Amendment does not prohibit all searches undertaken by government actors, but "merely proscribes those

[6] "Historically, we have interpreted Article I, Section 11 of the Wisconsin Constitution in accord with the Supreme Court's interpretation of the Fourth Amendment." State v. Arias, 2008 WI 84, ¶20, 311 Wis. 2d 358, 752 N.W.2d 748.

which are unreasonable." Howes, 373 Wis. 2d 468, ¶21 (quoting Tullberg, 359 Wis. 2d 421, ¶29 (quoting Florida v. Jimeno, 500 U.S. 248, 250 (1991))).

¶18 Drawing blood is a search of the person. Birchfield v. North Dakota, 579 U.S. ___, 136 S. Ct. 2160, 2173 (2016) (stating that "our cases establish that the taking of a blood sample or the administration of a breath test is a search"); Howes, 373 Wis. 2d 468, ¶20 (concluding that a blood draw is a search). Furthermore, a warrantless search is "presumptively unreasonable." State v. Brar, 2017 WI 73, ¶16, 376 Wis. 2d 685, 898 N.W.2d 499 (quoting Tullberg, 359 Wis. 2d 421, ¶30).

¶19 However, "there are certain 'specifically established and well-delineated' exceptions to the Fourth Amendment's warrant requirement." Brar, 376 Wis. 2d 685, ¶16 (quoting State v. Williams, 2002 WI 94, ¶18, 255 Wis. 2d 1, 646 N.W.2d 834). One such exception is a search conducted pursuant to consent. Brar, 376 Wis. 2d 685, ¶16. Warrantless consent searches are reasonable; and therefore, they are consistent with the Fourth Amendment. Fernandez v. California, 571 U.S. 292, 134 S. Ct. 1126, 1137 (2014); Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973).

C. Consent

¶20 In determining whether consent was given, we employ a two-step process. First, we examine whether relevant words, gestures or conduct supports a finding of consent. State v. Artic, 2010 WI 83, ¶30, 327 Wis. 2d 392, 786 N.W.2d 430.

Second, we examine whether the consent was voluntarily given. Id.

1. Implied Consent

¶21 As we have explained, consent to search need not be given verbally. State v. Phillips, 218 Wis. 2d 180, 197, 577 N.W.2d 794 (1998) (citing United States v. Griffin, 530 F.2d 739, 741 (7th Cir. 1976); United States v. Donlon, 909 F.2d 650, 652 (1st Cir. 1990) invalidated on other grounds by United States v. Omar, 104 F.3d 519 (1st Cir. 1997)). Consent given through conduct "provides a sufficient basis on which to find that the defendant consented to the search." Phillips, 218 Wis. 2d at 197 (concluding that defendant's affirmative assistance in the search of his bedroom demonstrated his consent to the search). "Through conduct, an individual may impliedly consent to be searched." Brar, 376 Wis. 2d 685, ¶17.

¶22 In addition, the United States Supreme Court has recently explained that consent also may be shown by the context in which consent arises. Birchfield, 136 S. Ct. at 2185. In Birchfield, the Court said that "[i]t is well established that a search is reasonable when the subject consents, and that sometimes consent to a search need not be express but may be fairly inferred from context." Id. (internal citations omitted). The Court's connection between context and consent was made in the course of Birchfield's review of searches incident to arrest for OWI in states that have implied-consent laws. Birchfield cited two cases that demonstrated constitutionally sufficient consent because of the context in

which consent was lawfully implied: Florida v. Jardines, 569 U.S. 1 (2013) and Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).

¶23 In Jardines, the Court, through Justice Scalia, recognized the sanctity of the home and that at the "very core" of the Fourth Amendment "stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion,'" and that this right extended to the curtilage of the home, including the home's front porch. Jardines, 569 U.S. at 6-7 (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

¶24 However, the Supreme Court also said that the sanctity of the curtilage of one's home is not absolute and certain permissions to enter may be implied. Jardines, 569 U.S. at 8. In Jardines, the Court recognized that by putting a knocker on his door, the homeowner had given implicit consent for visitors to approach and said that the implicit granting of such permission "does not require fine-grained legal knowledge." Id. Rather, law enforcement could approach a homeowner's front door "precisely because that is 'no more than any private citizen might do.'" Id. (quoting Kentucky v. King, 563 U.S. 452, 469 (2011)). The Court recognized that a homeowner who places a knocker on his front door impliedly invites visitors to approach and enter upon the home's curtilage. Jardines, 569 U.S. at 8. Stated otherwise, in the context established by the homeowner, consent to enter the curtilage and approach the front door was given.

¶25 The other decision referenced in Birchfield, Marshall v. Barlow's, Inc., noted that while generally the Fourth Amendment prohibits searches without a warrant, certain businesses and industries are subject to exception. Marshall, 436 U.S. at 313. Indeed, "pervasively regulated business[es]" and "'closely regulated' industries 'long subject to close supervision and inspection,'" are subject to warrant exceptions for certain searches. Id. (quoting Colonnade Catering Corp. v. United States, 397 U.S. 72, 73-75, 77 (1970) (wherein the Court held that the statutory right to enter and inspect a facility authorized to serve liquor required no warrant for the search)).

¶26 The Fourth Amendment exception upheld in Colonnade was grounded in "unique circumstances" in that "[c]ertain industries have such a history of government oversight that no reasonable expectation of privacy, could exist for a proprietor over the stock of such an enterprise." Marshall, 436 U.S. at 313 (internal citation omitted). Referring to the liquor and firearms industries, the Court said that "when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." Id. According to the Court, businesses in these industries are part of "a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." Id. By choosing to participate in certain businesses, the Court concluded that those persons had "accept[ed] the burdens as well as the benefits of their trade," in a manner different from other businesses and thus "in effect

consents to the restrictions placed upon him." Id. Once again, it was the context in which such businesses are operated that evidenced voluntary consent to be subjected to significant governmental regulation. Stated otherwise, the context in which one operates a business involved in alcohol or firearms had a well-known history of significant governmental regulation such that an owner of such a business would have no reasonable expectation of privacy from governmental oversight of his business. Id.

¶27 Birchfield's discussion of the relationship between context and consent instructs that context is part of the totality of circumstances that courts should review when consent to search is at issue. In regard to the context of highway regulation, we note that the statutes at issue here are the legislature's attempt to stop the injuries and deaths drunken drivers inflict year after year on others who use Wisconsin highways.[7] That drunken driving has resulted in and necessarily increased state regulation of the privilege of driving on public roadways is well known. Therefore, the context of well-publicized regulations forms part of the totality of circumstances we examine to determine whether a driver who has been arrested for OWI consented to be searched.

[7] The same is true across the nation. For example, it has been reported that in 2016 drunken driving took one life every 50 minutes in the United States. See National Highway Traffic Safety Administration, Drunk Driving, https://www.nhtsa.gov/risky-driving/drunk-driving (last visited June 25, 2018).

¶28 Some of the regulations to which drivers consent have never been challenged. For example, they agree to drive on the right side of the road, Wis. Stat. § 346.05; to yield the right-of-way to emergency vehicles, Wis. Stat. § 346.19; to comply with posted speed limits, Wis. Stat. § 346.57(4); and not to drive with a prohibited blood alcohol concentration, Wis. Stat. § 346.63(1)(b). While these regulations do not have implications for constitutional rights, drivers do not sign a form acknowledging these obligations each time they get into their vehicle; yet, they are held accountable and required to abide by each of them because they chose to drive a vehicle upon public highways.

¶29 Just as Wisconsin drivers consent to the above-listed obligations by their conduct of driving on Wisconsin's roads, in the context of significant, well-publicized laws designed to curb drunken driving, they also consent to an evidentiary drawing of blood upon a showing of probable cause to believe that they operated vehicles while intoxicated.[8] This qualified consent to search is required in order to exercise the privilege of driving in Wisconsin.[9] As Birchfield explained, implied consent laws condition "the privilege of driving on state roads

[8] Of course, probable cause to believe that a driver is operating while intoxicated is sufficient to arrest the driver.

[9] Probable cause to believe that a driver operated a vehicle while intoxicated is required before the driver must provide samples of breath, blood or urine. Wis. Stat. §§ 343.305(2) & (3)(a).

and [] the privilege would be rescinded if a suspected drunk driver refused to honor that condition." Birchfield, 136 S. Ct. at 2169. Consent is complete at the moment the driver begins to operate a vehicle upon Wisconsin roadways if the driver evidences probable cause to believe that he or she is operating a vehicle while intoxicated. Wis. Stat. §§ 343.305(2) & (3)(a).[10]

¶30 As acknowledged by the United States Supreme Court, driving on state highways is a privilege; it is not a right. Id. In Wisconsin, it is a statutory privilege that comes with

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[10] The point in time when a driver consents has been described in various ways based on the facts of the case and the arguments of counsel. For example, in Wintlend, 258 Wis. 2d 875, the court of appeals addressed Wintlend's argument that the officer's reading the Informing the Accused form to him coerced consent. Id., ¶8. The court rejected his argument and concluded that the statutory terms chosen by the legislature demonstrated that consent had been given before Wintlend was read the Informing the Accused form. Id., ¶16.

In State v. Neitzel, 95 Wis. 2d 191, 289 N.W.2d 828 (1980), Neitzel's license was suspended for 60 days for his unreasonable refusal to permit chemical testing. Id. at 192. Neitzel argued that the refusal was not unreasonable because he had asked to consult his attorney before deciding and his request was denied. Id. at 193. In dismissing Neitzel's argument, we said that under the circumstances no right to counsel was provided. Id. We also explained that a driver must be arrested before he or she could be asked to submit to chemical testing, but custody at that point did not implicate a right to counsel. Id. at 200. Because the focus in Neitzel was on an alleged right to counsel, our discussion addressed that concern. However, our discussion herein explains why constitutionally sufficient consent occurs when a driver operates a vehicle on Wisconsin's highways and drinks or uses drugs to a point where the driver exhibits probable cause that he or she is intoxicated.

statutory obligations when that privilege is exercised. Steeno v. State, 85 Wis. 2d 663, 671, 271 N.W.2d 396 (1978) ("The granting of an automobile license to operate a motor vehicle is a privilege and not an inherent right.").

¶31 The United States Supreme Court recognized that implied consent laws are the context in which constitutionally sufficient consent for chemical testing may be given when it opined, "our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. . . . [N]othing we say here should be read to cast doubt on them." Birchfield, 136 S. Ct. at 2185.

¶32 Birchfield also established a "categorical" rule that a breath test does not implicate "significant privacy concerns," and therefore, a warrant is not needed to administer a breath test. Birchfield, 136 S. Ct. at 2176-84. This is an interesting conclusion because of the Court's previous statements that there are no bright-line rules for determining when a warrant is not required. See Missouri v. McNeely, 569 U.S. 141, 158 (2013). It is also interesting because a driver's bodily alcohol concentration can be determined from evidentiary breath tests as well as from blood tests.

¶33 Birchfield went on to explain, "It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented

by virtue of a decision to drive on public roads." Birchfield, 136 S. Ct. at 2185 (emphasis added). The limit on the consequences of the decision to drive while intoxicated was the imposition of criminal penalties for refusing to permit a blood draw. Id.

¶34 Criminal penalties for withdrawing consent to a blood draw were beyond the scope of implied-consent laws because there was an insufficient nexus between the consequence of criminal penalties and choosing to drive on the highways in those states that imposed criminal penalties for withdrawing consent to provide a blood sample for testing. Id. at 2186. In Wisconsin, the consequences of refusing to permit a blood draw are civil and evidentiary, not criminal. Wis. Stat. § 343.305(4).

¶35 Relevant to assessing future challenges to refusal to submit to a blood draw, the Supreme Court adopted the following standard: motorists are "deemed to have consented to only those conditions that are 'reasonable' in that they have a 'nexus' to the privilege of driving and entail penalties that are proportional to severity of the violation." Id. When applying that standard, the Court concluded that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense [for refusing to submit]." Id. However, imposing "civil penalties and evidentiary consequences" on motorists who refuse to submit to a blood draw are permissible because civil penalties, such as license revocation, have a nexus to driving. Id. at 2185 (citing McNeely, 569 U.S. at 160-61).

¶36 Wisconsin imposes no criminal penalties for withdrawing consent previously given. The only criminal consequence imposed for drunken driving in Wisconsin arises from repeated OWI and PAC convictions and from convictions for causing injury or death by intoxicated use of a vehicle. See generally Wis. Stat. § 346.65. Criminal penalties do not arise from withdrawing consent to blood draws. Wis. Stat. § 343.305(4). All penalties for refusal are administrative and evidentiary. For example, a refusal that leads to a first OWI conviction subjects a defendant to a license suspension and a forfeiture but no jail time. Wis. Stat. §§ 343.305(4) & 346.65(1)(a).

¶37 Accordingly, we confirm that because it is constitutionally permissible to impose civil penalties as a consequence for refusing to submit to a blood draw, as Wis. Stat. § 343.305(4) provides, Wisconsin's implied-consent statutes, §§ 343.305(2) & (3)(a), describe a context consistent with Birchfield where constitutionally sufficient consent to search arises through conduct. Birchfield, 136 S. Ct. at 2185. Stated otherwise, it is not statutes that grant consent to search, but rather, consent is granted by the driver's exercising the privilege of driving on Wisconsin highways when he or she has imbibed sufficient alcohol or drugs to become intoxicated. Furthermore, if the consent that arises when a driver's conduct falls within §§ 343.305(2) & (3)(a) were not constitutionally sufficient consent for a blood draw, there

would be no reason to provide a statutory opportunity to withdraw consent under § 343.305(4).

¶38 Furthermore, we presume that drivers know the laws applicable to the roadways on which they drive. State v. Weber, 2016 WI 96, ¶78, 372 Wis. 2d 202, 887 N.W.2d 554 (Kelly, J., concurring). Likewise, we also recognize, as has the United States Supreme Court, that in a state with civil penalties for refusal to submit to a blood draw, "a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test." South Dakota v. Neville, 459 U.S. 553, 560 n.10 (1983).

¶39 In Neville, the Supreme Court examined whether Neville's refusal to submit to a blood-alcohol test could be used as evidence of guilt for drunken driving at his trial. The circuit court of South Dakota had suppressed Neville's refusal to submit to a blood-alcohol test based on the circuit court's conclusion that evidence of refusal violated Neville's federal constitutional rights. Id. at 556. The Supreme Court reversed the suppression because Neville's "right to refuse the blood-alcohol test [] is simply a matter of grace bestowed by the South Dakota legislature," not a constitutional right. Id. at 565. As the Court further explained, because a driver had no constitutional right to refuse a blood-draw when there was probable cause to arrest for OWI, the driver's refusal could be used against him at trial as evidence of guilt. Id.; see also Howes, 373 Wis. 2d 468, ¶62 (Gableman, J., concurring) ("[A]

driver has no statutory or constitutional right to refuse [blood alcohol testing] without consequences.").[11]

¶40 Of course, consent voluntarily-given before a blood draw may be withdrawn with or without a statutory reminder. United States v. Sanders, 424 F.3d 768, 774 (8th Cir. 2005). However, when consent is withdrawn, civil consequences may follow because the opportunity to withdraw voluntarily given consent is not of constitutional significance. Neville, 459 U.S. at 565; Wis. Stat. § 343.305(4).

¶41 The legitimacy of implied-consent laws has been supported repeatedly by the United States Supreme Court. In McNeely, the Court stated that "[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." McNeely, 569 U.S. at 160 (quoting Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990)). The Court further recognized that "drunk driving continues to exact a terrible toll on our society," and that "all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to

[11] Justices Shirley Abrahamson, Ann Walsh Bradley, Rebecca Grassl Bradley and Daniel Kelly manufacture a constitutional right to refuse blood-draws to test for blood-alcohol content of drivers who operate vehicles while intoxicated, notwithstanding the United States Supreme Court's clearly stated explanation in South Dakota v. Neville, 459 U.S. 553, 560 n.10, 565 (1983), that drunken drivers have no constitutional right to refuse blood-alcohol testing. State v. Dalton, 2018 WI 85, ¶61, 383 Wis. 2d 147, 914 N.W.2d 120 (manufacturing a constitutional right for drunken drivers to refuse blood-alcohol testing).

consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." McNeely, 569 U.S. at 160-61.

¶42 Other states are in accord with our conclusion that drivers give constitutionally sufficient consent through driving on state highways and drinking to a point evidencing probable cause of intoxication. For example, the Supreme Court of Colorado held that warrants need not be obtained for unconscious drivers as the result of their previously-given consent under Colorado's "Expressed Consent Statute." People v. Hyde, 393 P.3d 962 (Colo. 2017). The Colorado court recognized that "Hyde's statutory consent satisfied the consent exception to the Fourth Amendment warrant requirement." Id., ¶3. Similarly, the Supreme Court of Kentucky has said that drivers "consent[] to testing by operating a vehicle in Kentucky." Helton v. Commonwealth, 299 S.W.3d 555, 559 (Ky. 2009).

¶43 As judicial opinions of other states, as well as the United States Supreme Court's prior statements show, "[i]mplied consent is not a second-tier form of consent." Brar, 376 Wis. 2d 685, ¶23. Rather, when a driver chooses to operate a vehicle upon Wisconsin's roads, he or she does so charged with knowing the laws of this state. See Byrne v. State, 12 Wis. 577 (*519), 580 (*521) (1860).

¶44 Those laws include Wis. Stat. §§ 343.305(2) & (3)(a) that function together. Section 343.305(2) provides that anyone who "drives or operates a motor vehicle upon the public highways of this state . . . is deemed to have given consent to one or

more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of [alcohol or other prohibited substances], when requested to do so by a law enforcement officer." Section 343.305(3)(a) applies when a driver is arrested based on probable cause to believe that he or she is intoxicated, wherein a driver's conduct completes his or her obligation to give samples of breath, blood or urine.

¶45 In the case before us, Mitchell chose to avail himself of the privilege of driving upon Wisconsin's roads. Because he did so while intoxicated, by his conduct he consented to the effect of laws that are relevant to exercising that privilege. He did not need to read them off one-by-one, and then sign a piece of paper acknowledging his consent to be subject to those rules and penalties for failing to follow them. By driving in Wisconsin, Mitchell consented to have samples of his breath, blood or urine taken upon the request of a law enforcement officer who had probable cause to believe he was intoxicated, unless he withdrew such consent. Wis. Stat. §§ 343.305(2) and (3)(a).

2. Voluntary Consent

¶46 A determination that consent has been given is not the end of our inquiry, we also must determine whether the consent was given "freely and voluntarily." Artic, 327 Wis. 2d 392, ¶32. "However, the State need not demonstrate that consent was given knowingly or intelligently." Brar, 376 Wis. 2d 685, ¶26 (citing Schneckloth, 412 U.S. at 241 ("Nothing, either in the

purposes behind requiring a 'knowing' and 'intelligent' waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures.")). The concept of "'voluntariness' reflects an accommodation of complex, somewhat conflicting values." Artic, 327 Wis. 2d 392, ¶32 (citing Schneckloth, 412 U.S. at 224-25).

¶47 "The test for voluntariness is whether consent to search was given in the absence of duress or coercion, either express or implied." Phillips, 218 Wis. 2d at 197. In evaluating the voluntariness of consent, we evaluate "the totality of all the surrounding circumstances." Artic, 327 Wis. 2d 392, ¶32 (quoting Schneckloth, 412 U.S. at 226). No single criterion controls voluntariness. Phillips, 218 Wis. 2d at 197.

¶48 In making a determination of voluntariness, the State bears the burden to prove by clear and convincing evidence that consent was given voluntarily. Id. Our determination of the voluntariness of consent is a mixed question of fact and law. Id. In addition, voluntariness is a determination that we consider relative to Wis. Stat. §§ 343.305(2) & (3)(a) when a driver commences operation of his or her vehicle on Wisconsin roadways and under § 343.305(3)(b) when an unconscious driver has not availed himself of an opportunity to withdraw consent previously given.

¶49 Consent to search that arises in the context of Wisconsin's implied-consent laws is voluntary in one respect

that is similar to the voluntariness of consent in Colonnade because Wisconsin has a long history of close governmental regulation of its highways in regard to drunken drivers. Stated otherwise, the privilege of driving on Wisconsin highways comes within the context of well-publicized requirements to provide samples of breath, blood or urine to law enforcement who have probable cause to believe that the driver is intoxicated.

¶50 We now further consider voluntary consent under four subsections of Wisconsin's implied-consent law at issue in the case before us: Wis. Stat. §§ 343.305(2), 343.305(3)(a), 343.305(4) and 343.305(3)(b).[12]

a. Wisconsin Stat. §§ 343.305(2) & (3)(a)

¶51 The voluntariness of consent by conduct that occurs when a driver commences operation of his vehicle on Wisconsin roadways is unequivocal and constitutionally sufficient when he or she evidences the indicia of intoxication such that there is probable cause to believe he or she is driving under the influence. Stated otherwise, voluntary consent arises through the effect of a driver's conduct in the context of Wisconsin law, Wis. Stat. §§ 343.305(2) and 343.305(3)(a).

[12] We note that other circumstances are impacted by Wisconsin implied consent law that we do not discuss here. See Wis. Stat. § 343.305(3)(ar)2., causing death or great bodily harm when there is reason to believe the driver violated state or local traffic law. Here, we limit our discussion to those circumstances where there are no facts in addition to probable cause to believe the driver was intoxicated.

¶52 Wisconsin Stat. § 343.305(2) clearly provides, "[a]ny person who . . . drives or operates a motor vehicle upon the public highways of this state . . . is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances . . . ." A driver's consent is conditioned on probable cause to believe he or she is intoxicated or has caused serious injury or death. As Wis. Stat. § 343.305(3)(a) provides, "Upon arrest of a person for violation of s. 346.63(1) [driving while intoxicated], (2m) [underage drinking], or (5) [commercial driver] or . . . (2) [causing injury] . . . a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine." Therefore, as an initial matter, one consents to search by driving on Wisconsin roadways when one has imbibed sufficient alcohol to support probable cause to arrest. The choice to drive on Wisconsin roadways and the choice to drink or ingest drugs to the point of probable cause to arrest for OWI are voluntary choices.

b. Wisconsin Stat. § 343.305(4)

¶53 Wisconsin Stat. § 343.305(4) provides a statutory opportunity to withdraw consent given under §§ 343.305(2) and (3)(a), when an officer has probable cause to arrest the driver. However, civil penalties may follow when consent is withdrawn. Section 343.305(4) provides in relevant part:

> You have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs . . . or you are the operator of a vehicle that was involved in an accident that caused the death of, great bodily harm to, or substantial bodily harm to a person . . . .
>
> This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. . . . If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.[13]

It is helpful to keep subsection (4) in mind when discussing Wis. Stat. § 343.305(3)(b), which is central to this appeal.

¶54 Wisconsin Stat. § 343.305(4) provides a statutory opportunity to withdraw consent, even though a driver has operated a vehicle on Wisconsin roads and has imbibed sufficient alcohol to be arrested for OWI. Of course, one may withdraw consent previously given with or without a statutory reminder. See Sanders, 424 F.3d at 774. Nevertheless, a driver may

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[13] Justices Shirley Abrahamson, Ann Walsh Bradley, Rebecca Grassl Bradley and Daniel Kelly strike down, sub silentio, Wis. Stat. § 343.305(4)'s provision that the fact of refusal can be used against a drunken driver in court because they label refusal of chemical testing a constitutional right. Dalton, 383 Wis. 2d 147, ¶61. However, the United States Supreme Court has concluded that refusing to take a blood test is not of constitutional significance and can be used against the defendant at trial. Neville, 459 U.S. at 565. The majority opinion in Dalton and the separate writings in this case will create confusion in Wisconsin courts on the admissibility of refusal evidence because Neville has not been overruled and remains authoritative on whether refusal is or is not a constitutional right.

forfeit the driver's opportunity to withdraw consent by failing to timely engage it. State v. Ndina, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612. Furthermore, a defendant may forfeit an opportunity he or she otherwise would have by his or her conduct. State v. Anthony, 2015 WI 20, ¶59, 361 Wis. 2d 116, 860 N.W.2d 10.

¶55 Here, Mitchell drank sufficient alcohol to render himself unconscious. He had a BAC of 0.222. It is no wonder that he passed out.[14] Through this conduct, he forfeited all opportunity to withdraw the consent to search that he had given.

c. Wisconsin Stat. § 343.305(3)(b)

¶56 Mitchell was unconscious when his blood was drawn. Wisconsin Stat. § 343.305(3)(b) addresses blood draws from unconscious persons who have not availed themselves of the statutory opportunity that is provided by § 343.305(4) or otherwise taken steps to withdraw consent. Some who are unconscious have imbibed sufficient alcohol or drugs to render themselves unconscious; others may be unconscious due to an injury sustained in an accident. Section 343.305(3)(b) provides in relevant part:

> A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection, and if a law enforcement officer has probable cause to believe that

[14] See National Institute on Alcohol Abuse and Alcoholism, Alcohol Overdose: The Dangers of Drinking Too Much, https://pubs.niaaa.nih.gov/publications/AlcoholOverdoseFactsheet/Overdosefact.htm (Oct. 2015).

> the person has violated s. 346.63(1) [driving while intoxicated], (2m) [underage drinking] or (5) [commercial driver] . . . [or caused injury] one or more samples specified in par. (a) or (am) may be administered to the person.

¶57 The Fourth Amendment question is whether drawing Mitchell's blood while he was unconscious was unreasonable and therefore in violation of Fourth Amendment's prohibitions against unreasonable searches. Mitchell claims the blood draw was unreasonable because he was unconscious when the Informing the Accused form was read to him. The State claims that the blood draw was reasonable because Jaeger had arrested Mitchell for driving while intoxicated.[15]

¶58 Mitchell's self-induced physical condition does not render Wis. Stat. § 343.305(3)(b)'s presumption unreasonable under the totality of circumstances applicable to our Fourth

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[15] The State's contention could be read to assert that the blood draw was a search incident to arrest within the traditional exception to the Fourth Amendment's warrant requirement.

Mitchell's blood draw parallels the search incident to arrest doctrine, as probable cause to arrest Mitchell for driving while intoxicated is fully supported by the record. That a search incident to arrest is an exception to the warrant requirement is an important principle to keep in mind. This is so because all unconscious drivers are not subjected to a blood draw under Wisconsin implied consent laws. Only those drivers for whom "a law enforcement officer has probable cause to believe that the person has violated [laws regulating use of intoxicants]" can be searched. Wis. Stat. § 343.305(3)(b). This limitation also is consistent with the reasonableness requirement of the Fourth Amendment. For an unconscious driver, a blood draw is the only means by which to obtain evidence of the crime for which he or she has been charged.

Amendment discussion. First, by exercising the privilege of driving on Wisconsin highways, Mitchell's conduct demonstrated consent to provide breath, blood or urine samples to be tested in accord with §§ 343.305(2) & (3)(a) if law enforcement had probable cause to believe that he had operated his vehicle while intoxicated. Second, Jaeger had probable cause to arrest Mitchell for driving while intoxicated. His speech was slurred; he smelled of alcohol; he had difficulty maintaining his balance; his preliminary breath test showed a BAC of 0.24, which indicates significant intoxication. Third, Mitchell chose to drink sufficient alcohol to produce unconsciousness. Fourth, by his conduct, Mitchell forfeited the statutory opportunity to assert that he had "withdrawn consent" he previously gave. Ndina, 315 Wis. 2d 653, ¶29; Anthony, 361 Wis. 2d 116, ¶59.

¶59 Therefore, under the totality of circumstances as applied to Mitchell, Wis. Stat. § 343.305(3)(b)'s presumption is reasonable. Accordingly, drawing Mitchell's blood was reasonable, and no Fourth Amendment violation occurred.

¶60 Because we conclude that consent given by drivers whose conduct falls within the parameters of Wis. Stat. § 343.305 is constitutionally sufficient consent to withstand Fourth Amendment scrutiny, and although consent must be voluntary, it need not be knowing, we overrule State v. Padley, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867. We do so for two reasons. First, we clarify that Padley has no precedential effect because its holding is in direct conflict with an earlier, published court of appeals decision, State v. Wintlend,

2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745. Cook v. Cook, 208 Wis. 2d 166, 171, 560 N.W.2d 246 (1997) (concluding that the court of appeals cannot overrule or modify one of its published opinions). Second, Padley is simply wrong as a matter of law. There, the court of appeals said that "implied consent" is different than "actual consent," and that actual consent is given only when a driver affirms his or her previously-given implied consent after being read the Informing the Accused form. See Padley, 354 Wis. 2d 545, ¶38. The court also incorporated the concept of "knowingly" into consent law. Id., ¶62. Under the reasoning in Padley, driving on Wisconsin highways and drinking, using drugs or being involved in an accident causing death or serious bodily injury while violating a state or local traffic law does not provide constitutionally sufficient consent through conduct. We conclude otherwise.

¶61 The question that remains in regard to Mitchell is whether Wis. Stat. § 343.304(3)(b)'s presumption that consent has not been withdrawn is reasonable for a driver who has suffered an injury rendering him or her unconscious, but for whom there is probable cause to believe that he or she operated a vehicle in violation of laws regulating the use of intoxicants.

¶62 We begin by noting that all drivers, by their conduct, consent to provide samples of their breath, blood or urine when requested by law enforcement personnel who have probable cause to arrest for driving while intoxicated. Wis. Stat. §§ 343.305(2) & (3)(a). We also recognize that consent to

search once given may be withdrawn. See Sanders, 424 F.3d at 774. Although no magic words are required to withdraw consent, the intent to withdraw must be unequivocal. Id. Withdrawal of consent given under implied-consent laws also may be withdrawn. Wisconsin Stat. § 343.305(4) reminds drivers of the opportunity to "withdraw" consent previously given. See also State v. Arrotta, 339 P.3d 1177, 1178 (Idaho 2014) (concluding that under Idaho implied-consent laws, a suspected drunken driver can withdraw his or her consent to test for the presence of alcohol). However, for many unconscious drivers, it may be that they have taken no steps to demonstrate unequivocal intent to withdraw consent previously given.

¶63 Furthermore, the opportunity to refuse a blood test when there is probable cause to believe the driver is intoxicated is not of constitutional significance, as is shown by Supreme Court jurisprudence concluding that withdrawal of consent may be used as evidence of guilt at trial. State v. Crandall, 133 Wis. 2d 251, 255, 394 N.W.2d 905 (1986) (citing Neville, 459 U.S. at 565 (concluding that it is not "fundamentally unfair for South Dakota to use the refusal to take the test as evidence of guilt, even though respondent was not specifically warned that his refusal could be used against him at trial")).

¶64 In addition, Wis. Stat. § 343.305(3)(b)'s presumption affects only unconscious drivers for whom law enforcement has probable cause to believe that the driver has violated statutory proscriptions on use of intoxicants. Therefore, those drivers

who are unconscious but for whom law enforcement does not have probable cause to believe they drove while intoxicated will not be subject to the presumption of § 343.305(3)(b).

¶65 For drivers for whom the presumption applies, Wis. Stat. § 343.305(3)(b) is consistent with United States Supreme Court precedent that a warrantless search at arrest does not violate the Fourth Amendment when there is consent given prior to the search. United States v. Robinson, 414 U.S. 218, 224 (1973); Schneckloth, 412 U.S. at 222. Therefore, we conclude that under the totality of circumstances the presumption of § 343.305(3)(b) is reasonable. Accordingly, it does not violate Fourth Amendment rights of one for whom law enforcement has probable cause to believe he or she operated a vehicle after consuming alcohol or drugs to the point of intoxication.

III. CONCLUSION

¶66 We conclude that Mitchell voluntarily consented to a blood draw by his conduct of driving on Wisconsin's roads and drinking to a point evidencing probable cause of intoxication. Further, through drinking to the point of unconsciousness, Mitchell forfeited all opportunity, including the statutory opportunity under Wis. Stat. § 343.305(4), to withdraw his consent previously given; and therefore, § 343.305(3)(b) applied, which under the totality of circumstances reasonably permitted drawing Mitchell's blood. Accordingly, we affirm Mitchell's convictions.

By the Court.—The judgment of the circuit court is affirmed.

¶67 DANIEL KELLY, J. *(concurring)*. I do not believe the state can waive the people's constitutional protections against the state. I nonetheless concur because performing a blood draw on an unconscious individual who has been arrested for operating a motor vehicle while intoxicated in violation of Wis. Stat. § 346.63 ("OWI") is reasonable within the meaning of the Fourth Amendment to the United States Constitution.[1]

¶68 This is not the first time we have considered whether a law enforcement officer may perform a blood draw on an individual pursuant to "consent" granted by Wis. Stat. § 343.305. Last term we considered whether such "implied consent" can satisfy the requirements of the Fourth Amendment to the United States Constitution. See State v. Brar, 2017 WI 73, ¶¶15, 28-29, 376 Wis. 2d 685, 898 N.W.2d 99 (lead opinion). No opinion attracted a majority of the court. I concurred because Mr. Brar was conscious and had provided express consent to a blood draw, a point on which a majority of the court agreed. However, because the court nonetheless addressed the constitutionality of the implied consent statute, I also explained why I believe that "implied consent" is actually consent granted by the legislature, not the suspect, and why legislative consent cannot satisfy the mandates of our State and Federal Constitutions. See id., ¶¶44, 59 (Kelly, J., concurring); see also id., ¶15 & n.6 (lead opinion) (discussing

[1] I join paragraphs 1-2 and 4-28 of the lead opinion.

federal and state constitutional provisions). I incorporate that analysis here in toto.

¶69 The court today is even more ambitious than it was in Brar. Legislatively-granted consent to perform a blood draw is justified, the court says, for the same reasons certain searches of pervasively-regulated businesses do not require warrants. Lead op., ¶¶25-28 (citing Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970)). But the court misunderstands the significance of that line of cases. The searches considered there were not reasonable because a legislature said they were; they were reasonable because they did not intrude on the affected person's reasonable expectation of privacy. In Colonnade Catering, for example, the United States Supreme Court surveyed the regulatory history of the liquor industry, reaching as far back as England of the eighteenth century. Colonnade Catering, 397 U.S. at 75. The whole point of rehearsing that history was to demonstrate that a liquor retailer had no reasonable expectation his premises would be free from regular governmental inspection. See id. Therefore, the congressionally-developed inspection regime at issue in Colonnade Catering was constitutional because it operated in an area in which the retailer had no reasonable expectation of privacy. The United States Supreme Court has treated the firearm industry in a similar fashion. In United States v. Biswell, 406 U.S. 311 (1972), the Court said "[i]t is also apparent that if the law is to be properly enforced and inspection made effective, inspections without warrant must be

deemed reasonable official conduct under the Fourth Amendment." Id. at 316. Although the Court chose a stilted means of explaining itself, it is apparent the Court had concluded that the inspection regime in that case did not reach into an area in which the pawn dealer had a reasonable expectation of privacy. See id. The "pervasive-regulation" doctrine, therefore, allows warrantless inspection regimes only when the nature of the business at issue is such that the proprietor does not have an expectation of privacy.

¶70 The court should not venture into the "pervasive-regulation" arm of Fourth Amendment jurisprudence without a great deal of fear and trepidation. The rationale justifying this doctrine is too easy to abuse. If increased regulation decreases the areas in which individuals have a reasonable expectation of privacy, then the Fourth Amendment's protections are effectively contingent on the reach of the regulatory state. Through combined legislative and executive activity, oceans of regulations can wear away zones of privacy, allowing warrantless inspection regimes to follow in their wake.

¶71 Today's decision is a good example of the doctrine's erosive power. Driving, the court observes, is subject to many regulations, what with all the rules about staying on the right side of the road, speed limits, interactions with emergency vehicles, et cetera. The court could have mined that vein even more deeply than it did—under any definition, driving truly is pervasively regulated. The temptation to reach for the doctrine under these circumstances is nearly irresistible. And why

wouldn't it be? It fairly demands to be heard here. But this is a powerful and unruly force, and when the United States Supreme Court set it in motion, it impressed on the doctrine no internal logic capable of limiting its reach.

¶72 The court thinks to wield this doctrine here with limited effect—after all, we are simply justifying a warrantless blood draw. But the court misapprehends how the doctrine functions and, therefore, its consequences. If we are of a mind that this doctrine justifies the implied consent law, we may do so only if we first conclude that regulatory pervasiveness has removed the subject of its operation from the reasonable expectation of privacy. See Colonnade Catering, 397 U.S. at 75; Biswell, 406 U.S. at 316. That is to say, because driving is pervasively regulated, those who travel on Wisconsin's highways have no reasonable expectation of privacy as they engage in that activity. And if that is true, it would sweep away a large body of Fourth Amendment jurisprudence as it relates to traffic stops, searches of automobiles, searches of drivers and passengers, et cetera. Wielding this doctrine as the court does today, if we are serious about its application, calves off a substantial piece of the Fourth Amendment.

¶73 For these reasons, and the reasons I discussed in my Brar concurrence, I conclude that the consent implied by Wis. Stat. § 343.305 cannot justify the blood draw performed on Mr. Mitchell.

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¶74 But this case is not Brar, and different reasons justify the blood draw here. The most important distinction between the two cases is this: Mr. Mitchell was not conscious when the law enforcement officer determined that a blood draw was necessary. No Supreme Court decision has yet opined directly on whether a warrant is necessary to perform a blood draw under these circumstances; I believe the interplay among Schmerber v. California, 384 U.S. 757 (1966), Missouri v. McNeely, 569 U.S. 141 (2013), and Birchfield v. North Dakota, 136 S. Ct. 2160 (2016), leave that question open. Their combined rationale, however, indicates that no warrant is necessary to perform a blood draw when an individual has been arrested for OWI, the suspect is unconscious, and there is a risk of losing critical evidence through the human body's natural metabolization of alcohol.

¶75 For more than half a century now the United States Supreme Court has recognized that warrantless blood draws can be constitutional. In Schmerber, the Supreme Court recognized that exigent circumstances can justify a warrantless blood draw from an individual arrested on OWI charges. See Schmerber, 384 U.S. at 770-71. It said the human body's natural metabolization of alcohol could, under the right circumstances, cause an officer to "reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" Id. at 770 (citation omitted).

¶76 More recently, the State of Missouri pressed the Supreme Court to adopt a rule that the natural metabolization of alcohol in the bloodstream presents a per se exigency. McNeely, 569 U.S. at 151-52. The Court refused, but confirmed the continuing vitality of the rule that the proper circumstances will still justify a warrantless blood draw. "We do not doubt," the Court said, "that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test." Id. at 153. Therefore, "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." Id. at 156.

¶77 The constitutionality of a warrantless blood draw returned to the Supreme Court in the context of the "search incident to arrest" doctrine in Birchfield. 136 S. Ct. at 2179, 2185. There, the Court said this doctrine justifies a warrantless breath test when the individual has been arrested for OWI; however, it does not justify a warrantless blood draw (at least when the suspect is conscious). See id. at 2185. In reaching this conclusion, the Court placed heavy emphasis on the differing levels of intrusiveness between the two tests. Id. at 2178. Thus, for example, it said that "[b]ecause breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a

search incident to a lawful arrest for drunk driving." Id. at 2185.

¶78 Availability of the breath test, however, was the driving motivation for its ruling. In the absence of such an option, the reasonableness of a warrantless blood test increases:

> We reach a different conclusion with respect to blood tests. Blood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test. Respondents have offered no satisfactory justification for demanding the more intrusive alternative without a warrant.

Id. at 2184.

¶79 Combining the reasoning of Schmerber, McNeely, and Birchfield provides the necessary guidance for Mr. Mitchell's case. Schmerber established the ground-rule principle that a warrantless blood draw can be constitutional. See Schmerber, 384 U.S. at 770-71. McNeely refined the Schmerber holding when it explained that, under the right circumstances, "the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test." See McNeely, 569 U.S. at 153. Birchfield added two important pieces to the analysis. First, it established that an individual arrested for OWI may be searched incident to his arrest for evidence of intoxication without a warrant. See Birchfield, 136 S. Ct. at 2184. And second, it determined that the method by which law enforcement conducts the search (by breath test as opposed to blood test) depends on the availability of the less-intrusive option. See id. at 2185.

¶80 Here is how the Supreme Court's instructions apply in this case. Mr. Mitchell, of course, was arrested for OWI, so Schmerber and McNeely recognize that critical evidence of his intoxication was continually metabolizing away. They also explain that although metabolization alone would not support a warrantless blood draw, when combined with other elements it may. Birchfield says his privacy interest in the evidence of intoxication within his body is no longer a factor because the "search incident to arrest" doctrine is a recognized exception to the warrant requirement. So the only question remaining is whether the search should be conducted via a breath test or a blood test. Birchfield tells us that we must consider the availability of the less intrusive test in making this decision. Mr. Mitchell, however, was unconscious, so the breath test was not an option. A warrantless blood test was reasonable, therefore, because he had been arrested for OWI, evidence of the offense was continually dissipating, there was no telling how long he would be unconscious, his privacy interest in the evidence of intoxication within his body had been eviscerated by the arrest, and no less intrusive means were available to obtain the evanescent evidence.

¶81 I recognize that Birchfield holds a cautionary note about blood tests performed on unconscious suspects, but it appears to be in the form of an explanation for why the Court devoted just two sentences to the subject:

> It is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due

> to profound intoxication or injuries. But we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be.

Birchfield, 136 S. Ct. at 2184-85. Nothing in the opinion indicates the Supreme Court considered how its analytical structure would apply in the context of an unconscious suspect arrested for OWI, and it would be too much like reading tea leaves to give any substantive weight to a statement that simply gives the Court's reasons for not addressing the question we are deciding.[2]

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[2] The dissent believes Birchfield has already answered this question, and therefore concludes my "analytical exercise ultimately fails because it cannot be reconciled with Birchfield's central holding: 'a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving.'" Dissent, ¶101 n.6 (quoting Birchfield v. North Dakota, 136 S. Ct. 2160, 2185 (2016)) (emphasis omitted). The Supreme Court stated that central holding, however, in the context of a suspect who, unlike Mr. Mitchell, was conscious. This is a distinction that Birchfield itself advanced, so it's entirely justifiable to explore its significance, as I have done in this opinion.

But there is an even more important reason the dissent should be chary of finding such a categorical prohibition in that precedent: Birchfield is not comfortable in its own skin. Its central logic is actually self-contradictory, which explains why both the court and the dissent are able to call on it for support. If the Supreme Court had endorsed implied-consent laws as sufficient to authorize a breath or blood test (as our court says), then it would have held that implied consent justified the breath test. But it didn't. It said the "search incident to arrest" exception to the Fourth Amendment's warrant requirement justified the breath test. On the other hand, if Birchfield forbids blood draws pursuant to an implied-consent law, as the dissent claims, then such a law could not justify the breath test either, inasmuch as the law either provides constitutionally-sound consent for both, or for neither.

(continued)

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¶82 Apropos of nothing relevant to this case, the lead opinion says a quartet of the court's members, including the author of this concurrence and the justice who joins it, "label refusal of chemical testing a constitutional right [in State v. Dalton, 2018 WI 85, ¶61, 383 Wis. 2d 147, 914 N.W.2d 120]." See lead op., ¶53 n.13. If the lead opinion means to say that we understand the people of Wisconsin have a constitutionally-protected right to be free from warrantless, unreasonable searches, then it is spot-on. And if the lead opinion further means to say that we recognize that the people of Wisconsin may operationalize that constitutionally-protected right by refusing warrantless, unreasonable searches, then it again hits the bulls-eye. But none of that happened in Dalton. It happened when the people of this nation ratified the Bill of Rights. We have done nothing new here; we only recognize what is already the law.

¶83 Ultimately, the lead opinion is of two minds on whether a suspect may refuse a blood test, and it expressed both of them. On the one hand, it says that, "in a state with civil

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So I disagree with the dissent that I cannot reconcile my analytical exercise to Birchfield's central holding. When the Supreme Court speaks with two contradictory voices in one opinion, the best we can do is follow its logic until it starts contending with itself. Here, that means Birchfield stands for the proposition that, with respect to conscious drunk-driving suspects, the "search incident to arrest" doctrine covers breath tests, but not blood draws. Because Mr. Mitchell was not conscious, Birchfield does not control the disposition of this case.

penalties for refusal to submit to a blood draw, 'a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test.'" Lead op., ¶38 (quoting South Dakota v. Neville, 459 U.S. 553, 560 n.10 (1983)). But almost immediately afterwards it also said: "Of course, consent voluntarily-given before a blood draw may be withdrawn with or without a statutory reminder." Lead op., ¶40 (citing United States v. Sanders, 424 F.3d 768, 774 (8th Cir. 2005)). So which is it? May a suspect refuse a blood test or not?

¶84 Perhaps, however, the lead opinion means to say that when a blood test is conducted pursuant to consent—real consent, the kind that people provide, not legislatures—the consent can be withdrawn, but when conducted pursuant to legislatively-provided consent, it cannot. That seems to be the import of the observation that the "right to refuse the blood-alcohol test . . . is simply a matter of grace bestowed by the . . . legislature." See lead op., ¶39 (quoting Neville, 459 U.S. at 565). But if that is so, what possible jurisprudential theory allows a statute to make permanent what the constitution makes revocable?[3]

[3] The right to refuse a search, and to revoke consent once given, has been a part of Fourth Amendment jurisprudence for a very long time. See Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) (stating that consent may be refused); United States v. Carter, 985 F.2d 1095, 1097 (D.C. Cir. 1993) (stating that consent may be withdrawn); United States v. Black, 675 F.2d 129, 138 (7th Cir. 1982) (same); Mason v. Pulliam, 557 F.2d 426, 428 (5th Cir. 1977) (stating that nothing in Schneckloth prevents consent from being withdrawn).

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¶85 For these reasons, I respectfully concur in our court's mandate.

¶86 I am authorized to state that Justice REBECCA GRASSL BRADLEY joins this concurrence.

¶87 ANN WALSH BRADLEY, J. *(dissenting)*. A blood draw is a particularly intrusive search. It invades the interior of the human body and implicates interests in human dignity and privacy. Schmerber v. California, 384 U.S. 757, 769-70 (1966). To allow a blood draw without a warrant runs counter to these significant interests, not to mention United States Supreme Court precedent.

¶88 The police took Gerald Mitchell's blood without a warrant while he was unconscious. According to the lead opinion[1], this is perfectly fine because Mitchell by implication "voluntarily consented" to a blood draw and, while he was unconscious, did not revoke such consent.

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[1] I use the term "lead" opinion for two reasons. First, I am concerned that without this cue, the reader may mistakenly believe that the lead opinion has any precedential value. Although five justices join in the mandate of the opinion to affirm the court of appeals (Roggensack, C.J., joined by Ziegler, J., Gableman, J., Rebecca Grassl Bradley, J., and Kelly, J.,), it represents the reasoning of only three justices (Roggensack, C.J., joined by Ziegler, J., and Gableman, J.). Justices Rebecca Grassl Bradley and Kelly joined in the mandate, but they would rely on contrary reasoning. Other paragraphs of the lead opinion that Justice Kelly indicates that he joins provide only uncontested factual and legal background that do not include the lead opinion's reasoning. See Justice Kelly's concurrence, ¶67 n.1.

Although set forth in two separate opinions, four justices disagree with the reasoning of the lead opinion. Importantly, contrary to the lead opinion, four justices determine that the implied consent laws cannot justify the warrantless blood draw performed in this case (Abrahamson, J., Ann Walsh Bradley, J., Rebecca Grassl Bradley, J., and Kelly, J.).

The lead opinion fails to alert readers as to the non-precedential status of its essential reasoning. Lest the rule of law be unclear to courts and litigants: BY THEMSELVES, THE IMPLIED CONSENT LAWS CANNOT JUSTIFY A WARRANTLESS BLOOD DRAW.

¶89 Contrary to the lead opinion, I determine that "implied consent" is not the same as "actual consent" for purposes of a Fourth Amendment search. By relying on the implied consent laws, the lead opinion attempts to create a statutory per se exception to the constitutionally mandated warrant requirement. Thus, it embraces a categorical exception over the constitutionally required consideration of the totality of the circumstances. Consent provided solely by way of an implied consent statute is constitutionally untenable.[2]

¶90 Accordingly, I respectfully dissent.

I

¶91 Mitchell was arrested for operating while intoxicated. En route to a nearby hospital, he lost consciousness. Despite Mitchell's incapacitation, a police officer read him the Informing the Accused form. Mitchell provided no response because he was unconscious. The officer then directed hospital staff to draw a sample of Mitchell's blood, and they did so. Mitchell remained unconscious as his skin was pierced and his blood taken.

¶92 Seeking to exclude the evidence obtained as a result of the blood draw, Mitchell filed a motion to suppress. He premised his motion on the contention that the warrantless

[2] I observe that the concurrence and this dissent are in accord on this point. The concurrence "do[es] not believe that the state can waive the people's constitutional protections against the state." Concurrence, ¶67. Accordingly, it concludes that "the consent implied by § 343.305 cannot justify the blood draw performed on Mr. Mitchell." Id., ¶73.

taking of his blood while he was unconscious violated his Fourth Amendment rights.

¶93 The lead opinion rejects Mitchell's argument, concluding that the consent exception to the Fourth Amendment's warrant requirement applies. Lead op., ¶3. According to the lead opinion, Mitchell "voluntarily consented to a blood draw by his conduct of driving on Wisconsin's roads and drinking to a point evidencing probable cause of intoxication." Id. Further, in the lead opinion's view, Mitchell "forfeited all opportunity, including the statutory opportunity under Wis. Stat. § 343.305(4), to withdraw his consent previously given . . . ." Id.

II

¶94 The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect against unreasonable searches and seizures. State v. Eason, 2001 WI 98, ¶16, 245 Wis. 2d 206, 629 N.W.2d 625. A warrantless search is presumptively unreasonable unless an exception to the warrant requirement applies. State v. Tullberg, 2014 WI 134, ¶30, 359 Wis. 2d 421, 857 N.W.2d 120.

¶95 One such exception to the warrant requirement is a search conducted pursuant to consent. State v. Artic, 2010 WI 83, ¶29, 327 Wis. 2d 392, 786 N.W.2d 430. The lead opinion correctly states that relevant words, gestures or conduct may support a finding of consent. Lead op., ¶20 (citing Artic, 327

Wis. 2d 392, ¶30).[3] However, it errs by departing from Mitchell's "words, gestures or conduct" to determine that he impliedly consented for the state to draw his blood.

¶96 The lead opinion's conclusion is based on Wisconsin's implied consent laws, one subsection of which provides that any person operating a motor vehicle in Wisconsin "is deemed to have given consent to one or more tests of his or her breath, blood or urine" when requested to do so by a law enforcement officer in certain circumstances. Wis. Stat. § 343.305(2).

¶97 Another subsection specifically addresses the situation where a driver is unconscious. Wisconsin Stat. § 343.305(3)(b) provides that "[a] person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection." It further states that a law enforcement officer may administer a breath, blood, or urine test if probable cause exists that the driver has committed any of a list of offenses. Id.

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[3] The lead also cites State v. Phillips, 218 Wis. 2d 180, 197, 577 N.W.2d 794 (1998), for the proposition that consent to search need not be given verbally. Lead op., ¶21. In Phillips, when asked by law enforcement whether they could search the defendant's bedroom, "the defendant did not respond verbally, but he opened the door to and walked into his bedroom, retrieved a small baggie of marijuana, handed the baggie to the agents, and pointed out a number of drug paraphernalia items." 218 Wis. 2d at 197. The court concluded that "[t]he defendant's conduct provides a sufficient basis on which to find that the defendant consented to the search of his bedroom." Id. The affirmative assistance provided by the defendant in response to a request to search in Phillips is a far cry from the complete lack of response from the defendant here.

¶98 In determining whether the warrantless taking of a blood draw from an unconscious person pursuant to Wis. Stat. § 343.305(3)(b) violates the Fourth Amendment, I begin my analysis with Birchfield v. North Dakota, 579 U.S. __, 136 S. Ct. 2160 (2016). In Birchfield, the United States Supreme Court determined that "a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving." Id. at 2185.

¶99 Birchfield emphasized the invasive nature of a blood test, which is significant for Fourth Amendment purposes. See id. at 2184. In comparison to a breath test, a blood test is "significantly more intrusive[.]" Id. As an intrusion "beyond the body's surface," a blood test implicates paramount "interests in human dignity and privacy[.]" Id. at 2183 (citing Schmerber, 384 U.S. at 769-70). Indeed, a blood test can provide a lot more information than just a person's blood alcohol content.[4]

¶100 The Birchfield court further addressed the precise circumstances that have arisen in this case:

> It is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to

[4] "[A] blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested." Birchfield v. North Dakota, 579 U.S. __, 136 S. Ct. 2160, 2178 (2016).

> do what is needed to take a breath test due to profound intoxication or injuries. But we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be.

136 S. Ct. at 2184-85 (emphasis added).

¶101 This language compels a single conclusion: law enforcement needed a warrant here. First, the State concedes that there were no exigent circumstances that would justify a departure from the warrant requirement.[5] Second, the ultimate holding in Birchfield was that a blood test cannot be administered as a search incident to arrest for drunk driving. Id. at 2185. The lead opinion's interpretation of the implied consent statutes attempts to accomplish exactly what the Birchfield court said violates the Fourth Amendment—a blood test as a search incident to the arrest of an unconscious person for drunk driving.[6]

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[5] See State v. Tullberg, 2014 WI 134, ¶30, 359 Wis. 2d 421, 857 N.W.2d 120.

[6] The concurrence focuses on language in Birchfield stating a blood test's "reasonableness must be judged in light of the availability of the less intrusive alternative of a breath test." Birchfield, 136 S. Ct. at 2184; see concurrence, ¶¶77-79. It creatively interprets this language to indicate that, because a breath test was unavailable due to Mitchell's unconsciousness, a blood test was constitutionally reasonable. Id., ¶80. The concurrence's analytical exercise ultimately fails because it cannot be reconciled with Birchfield's central holding: "a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving." Birchfield, 136 S. Ct. at 2185 (emphasis added).

(continued)

¶102 Unlike the lead opinion, I would follow, rather than attempt to overrule, the court of appeals in State v. Padley, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867. The Padley court emphasized that, when analyzing whether there was a consensual search, the determining factor was whether the driver gave actual consent to the blood draw:

> [T]he implied consent law is explicitly designed to allow the driver, and not the police officer, to make the choice as to whether the driver will give or decline to give actual consent to a blood draw when put to the choice between consent or automatic sanctions. Framed in the terms of "implied consent," choosing the "yes" option affirms the driver's implied consent and constitutes actual consent for the blood draw. Choosing the "no" option acts to withdraw the driver's implied consent and establishes that the driver does not give actual consent.

354 Wis. 2d 545, ¶39. As Justice Abrahamson has explained, "[t]he Padley court concluded that a driver's actual consent occurs after the driver has heard the Informing the Accused Form, weighed his or her options (including the refusal penalties), and decided whether to give or decline actual consent." State v. Brar, 2017 WI 73, ¶116, 376 Wis. 2d 685, 898 N.W.2d 499 (Abrahamson, J., dissenting).

Federal and state courts around the country have cited the "but not a blood test" language a multitude of times. See, e.g., Robertson v. Pichon, 849 F.3d 1173, 1184 n.7 (9th Cir. 2017; Espinoza v. Shiomoto, 215 Cal. Rptr. 3d 807, 829 (Ct. App. 2017); State v. Ryce, 396 P.3d 711, 717 (Kan. 2017); State v. Reynolds, 504 S.W.3d 283, 307 (Tenn. 2016). The concurrence is unable to cite to any court that eschews the clear language of Birchfield's central holding in favor of the unique interpretation it now embraces.

¶103 That implied consent and actual consent are separate and distinct concepts is confirmed by an analysis of recent United States Supreme Court precedent in addition to Birchfield.[7] In Missouri v. McNeely, the Supreme Court determined that "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." 569 U.S. 141, 156 (2013). A case by case determination is the antithesis of a categorical exception. Although McNeely was an exigent circumstances case, the court's emphasis on the totality of the circumstances suggests broad application of the case by case determinations it requires. Brar, 376 Wis. 2d 685, ¶122 (Abrahamson, J., dissenting).

¶104 Indeed, the Supreme Court implied such a broad application of McNeely in Aviles v. Texas, 571 U.S. 1119 (2014). In Aviles, the Court vacated a Texas judgment upholding a warrantless blood draw based not on actual consent but on implied consent derived through the Texas implied consent law. 571 U.S. 1119 (2014). The Court further remanded the Aviles case to the Texas court of appeals for further consideration in light of McNeely. Id.

¶105 "Aviles suggests that McNeely should be read broadly to apply to all warrantless blood draws and that the Texas implied consent statute was not a per se exception to the Fourth

[7] For further in-depth analysis of this assertion, see State v. Brar, 2017 WI 73, ¶¶119-126, 376 Wis. 2d 685, 898 N.W.2d 499 (Abrahamson, J., dissenting).

Amendment justifying warrantless blood draws." Brar, 376 Wis. 2d 685, ¶123 (Abrahamson, J., dissenting). On remand the Texas court of appeals concluded that the Texas implied consent statute "flies in the face of McNeely's repeated mandate that courts must consider the totality of the circumstances of each case." Aviles v. State, 443 S.W.3d 291, 294 (Tex. Ct. App. 2014).

¶106 The upshot of these United States Supreme Court cases is that reliance on an implied consent statute to provide actual consent to a Fourth Amendment search violates McNeely's requirement that each blood draw in a drunk driving case be analyzed on a case by case basis. The implied consent statute attempts to create a per se exception to the warrant requirement. Of course, categorical consent is by definition not individualized.

¶107 The lead opinion employs the simple act of driving an automobile as justification for a search. The untenability of the lead opinion's position is aptly illustrated by Justice Kelly's concurrence in Brar, 376 Wis. 2d 685, ¶¶59-66 (Kelly, J., concurring). As Justice Kelly explains, a court's normal constitutional inquiry into whether consent is given involves an examination of the totality of the circumstances and a determination that the consent was voluntary and not mere acquiescence to authority. Id., ¶¶59-62. On the other hand, "[f]or 'consent' implied by law, we ask whether the driver drove his car." Id., ¶64.

¶108 Further, the lead opinion errs by relying not on a constitutionally well-recognized exception to the warrant requirement, but instead on a Wisconsin statute, to curtail constitutional protections. By seeking to create a statutory, per se consent exception to the warrant requirement, the lead opinion further steps into a minefield. See lead op., ¶¶53-55 (asserting that Mitchell "forfeited the statutory opportunity to withdraw the consent to search that he had given.").

¶109 A blood draw is plainly a "search" for Fourth Amendment purposes. Birchfield, 136 S. Ct. at 2185. Accordingly, one has a constitutional right, not merely a statutory right, to refuse such a search absent a warrant or an applicable exception.[8] See State v. Dalton, 2018 WI 85, ¶61, 383 Wis. 2d 147, 914 N.W.2d 120. Under the lead opinion's analysis, however, the opportunity to refuse an unconstitutional search is merely a matter of legislative grace. If the ability to withdraw consent is merely statutory, could the legislature remove the ability to withdraw consent entirely? For the Fourth Amendment to have any meaning, such a result cannot stand.

¶110 I therefore conclude that implied consent is insufficient for purposes of a Fourth Amendment search. As the

[8] The lead opinion's reliance on South Dakota v. Neville, 459 U.S. 553, 560 n.10 (1983), is misplaced. See lead op., ¶¶38-39. Neville was decided pre-McNeely and pre-Birchfield. Both McNeely and Birchfield have had a significant effect on drunk driving law, and highlight the constitutional nature of a blood draw. Both cases analyze breath and blood tests as Fourth Amendment searches and appear to supersede the statement from the Fifth Amendment Neville case on which the lead opinion relies.

court of appeals explained in Padley, the implied consent law does not authorize searches. Rather, it authorizes law enforcement to require a driver to make a choice: provide actual consent and potentially give the state evidence that the driver committed a crime, or withdraw implied consent and thereby suffer the civil consequences of withdrawing consent. Padley, 354 Wis. 2d 545, ¶39.

¶111 A person who is unconscious cannot make this choice. Because he was unconscious, Mitchell did not react to the Informing the Accused Form when law enforcement presented him with his options. He exhibited no "words, gestures, or conduct" that would indicate his actual consent to a blood draw. See Artic, 327 Wis. 2d 392, ¶30.

¶112 Because consent provided solely by way of an implied consent statute is not constitutionally sufficient, I determine that the results of Mitchell's blood draw must be suppressed. Accordingly, I respectfully dissent.

¶113 I am authorized to state that Justice SHIRLEY S. ABRAHAMSON joins this dissent.

Appeal No. 2015AP304-CR Cir. Ct. No. 2013CF365

WISCONSIN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GERALD P. MITCHELL,

DEFENDANT-APPELLANT.

FILED

MAY 17, 2017

Diane M. Fremgen
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Pursuant to WIS. STAT. RULE 809.61, this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

This cases raises a single question: whether the warrantless blood draw of an unconscious motorist pursuant to Wisconsin's implied consent law, where no exigent circumstances exist or have been argued, violates the Fourth Amendment.

BACKGROUND

Gerald P. Mitchell was charged with operating a motor vehicle while intoxicated (OWI), and operating with a prohibited alcohol concentration (PAC).[1] He moved to suppress the results of a blood test taken while he was unconscious. The parties do not contest the basic facts on appeal.

Officer Alexander Jaeger was the sole witness at the suppression hearing. He testified that around 3:17 p.m. on May 30, 2013, he received a dispatch call to check on the welfare of a male subject in Sheboygan County. When he arrived, he spoke with the complainant, Alvin Swenson, who informed Jaeger that he knew Mitchell and "received a telephone call from ... Mitchell's mother concerned about his safety." Swenson told Jaeger that he went to his window shortly after the call and observed Mitchell in a discombobulated state. Mitchell was "very disoriented," and he "appeared [to be] intoxicated or under the influence, was stumbling, had thrown a bag of garbage into the backyard and had great difficulty maintaining balance, nearly falling several times before getting into a gray minivan and driving away."

Jaeger was able to locate Mitchell walking down St. Clair Avenue about one-half hour after speaking with Swenson. A gray van was also found nearby on Michigan Avenue. Mitchell's state was consistent with what Swenson described. Mitchell was not wearing a shirt, and was wet and covered in sand "similar to if you had gone swimming in the lake." Jaeger explained that Mitchell

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[1] Mitchell had six previous OWI convictions, which subjected him to enhanced penalties. *See* WIS. STAT. § 346.65(2)(am)6. (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

"was slurring his words" and "had great difficulty in maintaining balance," nearly falling over "several times," necessitating Jaeger and another officer to help him "to ensure he wouldn't fall."

Initially, Mitchell stated that he had been drinking "in his apartment." However, he later altered his story and informed Jaeger "that he was drinking down at the beach" and parked his vehicle "because he felt he was too drunk to drive." Jaeger further explained that Mitchell's current condition made administration of the standard field sobriety tests unsafe, so he declined to administer them. Jaeger did administer a preliminary breath test, which indicated an alcohol concentration of .24. Based on his observations, Jaeger arrested Mitchell for OWI at approximately 4:26 p.m.

On the way to the police station, Mitchell's condition began to decline, and he became more lethargic. Upon arriving at the station, Mitchell had to be helped out of the squad car. Jaeger concluded that a breath test would not be appropriate, and he took Mitchell from the station to the hospital for a blood test. The drive took approximately eight minutes. During the drive, Mitchell "appeared to be completely incapacitated, would not wake up with any type of stimulation, and had to be escorted into the hospital by wheelchair." Jaeger then read the "Informing the Accused form verbatim" to the inert Mitchell. Mitchell did not respond. Because of Mitchell's "unusual" level of incapacitation, obtaining affirmative verbal "consent" at that time was not possible. Jaeger admitted on cross-examination that he could have applied for a warrant; he did not.

Accordingly, at 5:59 p.m. a blood sample was taken, which revealed a blood alcohol concentration of .222g/100mL.[2]

Mitchell argued that the blood test should be suppressed because it was taken without a warrant or his consent. The State responded that Mitchell had consented to the blood draw via the "implied consent" provided for in WIS. STAT. § 343.305. The State explained that under § 343.305(3)(b), unconscious persons are presumed not to have withdrawn their consent, and therefore—because Mitchell was unconscious—the warrantless blood draw was pursuant to this (implied) consent.

The State expressly disclaimed that it was relying on exigent circumstances to justify the draw, explaining that "[t]here is nothing to suggest that this is a blood draw on [an] exigent circumstances situation when there has been a concern for exigency." The circuit court denied Mitchell's motion, reasoning that WIS. STAT. § 343.305(3)(b) "makes clear that an unconscious operator .... cannot withdraw their consent to a blood sample." The only remaining question, the court reasoned, was whether probable cause supported the blood draw, which it clearly did.

After a jury trial, Mitchell was convicted on both the OWI count and the PAC count. He was sentenced to three years of initial confinement and three years of extended supervision on each count to be served concurrently. Mitchell appeals from his convictions.

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[2] Although the specific results were not mentioned during the suppression hearing, Mitchell entered into a stipulation at trial that the results were .222g/100mL.

DISCUSSION

This case squarely asks whether the "implied consent" outlined in WIS. STAT. § 343.305(3)(b) constitutes consent to a search under the Fourth Amendment. Although no case has explicitly decided the precise issue of whether a warrantless blood draw on an unconscious motorist may be justified solely by "implied consent," our precedents do address whether statutory implied consent is actual consent. These cases offer differing answers to that question, and accordingly, we must certify. *See* ***Marks*** *v.* ***Houston Cas. Co.***, 2016 WI 53, ¶¶78-79, 369 Wis. 2d 547, 881 N.W.2d 309 (holding that the court of appeals should certify an issue where two of its cases conflict).

We certified this precise issue previously in ***State*** *v.* ***Howes***, No. 2014AP1870-CR, unpublished certification (WI App Jan. 28, 2016). Although certification was granted, the lead opinion decided the case on the basis that exigent circumstances justified the search. ***State*** *v.* ***Howes***, 2017 WI 18, ¶3, 373 Wis. 2d 468, ___ N.W.2d ___. Justice Gableman, joined by Justice Ziegler, authored a concurrence explaining his view that implied consent constitutes actual consent. *Id.*, ¶¶52, 84 (Gableman, J., concurring). Justice Abrahamson authored a dissent that explained her view that implied consent did not constitute actual consent for Fourth Amendment purposes. *Id.*, ¶¶89, 136 (Abrahamson, J., dissenting). She was joined in this reasoning by Justice Ann Walsh Bradley and Justice Kelly. *Id.*, ¶154. With no controlling majority view, this question remains unanswered.

This case presents the opportunity to clarify the law head-on. While consent is not the only circumstance in which a warrantless search is permissible, none of the other "few" and "well-delineated" exceptions were argued, briefed, or

otherwise addressed. *See* ***State*** *v.* ***Faust***, 2004 WI 99, ¶11, 274 Wis. 2d 183, 682 N.W.2d 371 ("Subject to a few well-delineated exceptions, warrantless searches are deemed per se unreasonable under the Fourth Amendment."). In particular, this case is not susceptible to resolution on the ground of exigent circumstances. No testimony was received that would support the conclusion that exigent circumstances justified the warrantless blood draw. Jaeger expressed agnosticism as to how long it would have taken to obtain a warrant, and he never once testified (or even implied) that there was no time to get a warrant. The State, which bears the burden to prove that exigent circumstances existed and justified the warrantless intrusion, conceded that this exception is inapplicable below, and it does the same before us. The sole question, then, is whether Mitchell consented to the blood draw.

A. Legal Overview

The Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures. Under these provisions, "[w]arrantless searches are per se unreasonable, subject to several clearly delineated exceptions." ***State*** *v.* ***Artic***, 2010 WI 83, ¶29, 327 Wis. 2d 392, 786 N.W.2d 430. Consent is one of these "clearly delineated exceptions." ***Id.*** Although consent may be given by "words, gestures, or conduct," it must be actual consent, which is a question of historical fact. ***Id.***, ¶30. It is the State's burden to establish and prove by clear and convincing evidence that consent was voluntary. ***Id.***, ¶32.

The United States Supreme Court has "referred approvingly of the general concept of implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." ***Birchfield*** *v.*

North Dakota, 136 S. Ct. 2160, 2185 (2016). But it has yet to decide whether the "implied consent" that flows from a statutory scheme constitutes actual Fourth Amendment consent. *See id.* at 2185. Some state courts have concluded that statutory implied consent satisfies the Fourth Amendment. *See, e.g.*, *Bobbeck v. Idaho Transp. Dep't*, 363 P.3d 861, 866-67 (Idaho Ct. App. 2015), *review denied* (Idaho Dec. 23, 2015). Others have reasoned that such implied consent is a legal fiction that does "not take into account the totality of the circumstances" as required by the United States Supreme Court, and therefore implied consent alone cannot justify a warrantless search. *See, e.g.*, *Aviles v. State*, 443 S.W.3d 291, 294 (Tex. App. 2014) (citation omitted).

Wisconsin's implied consent law is contained in WIS. STAT. § 343.305. It provides as follows:

> Any person who ... drives or operates a motor vehicle upon the public highways of this state ... is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol ... when requested to do so by a law enforcement officer under sub. (3)(a) or (am) or when required to do so under sub. (3)(ar) or (b). Any such tests shall be administered upon the request of a law enforcement officer.

Sec. 343.305(2). Because Mitchell was unconscious, it is the "implied consent" to submit to a blood test "when required to do so" under para. (3)(b) that concerns us here.

Addressing unconscious motorists, WIS. STAT. § 343.305(3)(b) operates in a simple, straightforward manner. It provides the following:

> A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection, and if a law enforcement officer has probable cause to believe that the person has

> violated [WIS. STAT. §] 346.63(1) .... one or more samples specified in par. (a) or (am) may be administered to the person.

Id. Thus, by choosing to drive on public roads prior to losing consciousness, an unconscious person is "deemed to have given consent" to his or her blood being tested. That consent is "presumed" not to have been withdrawn. Accordingly, an officer may act on this "implied consent" and conduct a warrantless blood draw provided that the officer "has probable cause to believe" the unconscious person has violated WIS. STAT. § 346.63(1)—as Jaeger concededly did here.

B. The Parties' Positions

The parties agree that WIS. STAT. § 343.305(3)(b) is the applicable provision at issue. Neither party contests that Jaeger had probable cause to believe Mitchell was guilty of OWI at the time of the blood draw. The parties disagree, however, about whether the blood draw was reasonable under the Fourth Amendment.

The State relies exclusively on Mitchell's "implied consent" to justify the warrantless blood draw. The State's position is simple: Mitchell consented to have his blood drawn when he drove on Wisconsin highways and never withdrew that consent. In the State's view, this "consent" passes constitutional muster.

Mitchell takes the position that statutory implied consent cannot operate as Fourth Amendment consent because he had "no opportunity to consent or to refuse consent." In his view, consent occurs when an officer reads the Informing the Accused, not when a person drives on Wisconsin roads. Because he was incapable of giving affirmative consent to the blood draw, he concludes that

the blood draw cannot be justified under the consent exception.[5] Thus, though he does not quite frame it as such, his argument is in effect that the implied consent applying to unconscious individuals as described in WIS. STAT. § 343.305(3)(b) is unconstitutional—i.e., it cannot justify a warrantless blood draw.

C. Our Precedents Offer Conflicting Answers

Our certification in ***Howes*** explained in much greater detail the case law and constitutional background to this question. Having just considered ***Howes***, the members of the court are well aware of the important questions and various arguments pro and con. Rather than retread and repeat the same ground, we briefly explain why we believe we are compelled to certify this question again. Namely, two of our own cases—***State v. Padley***, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867, and ***State v. Wintlend***, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745—specifically addressed how the implied consent statute operates and whether it satisfies the consent exception, and both came to incompatible answers.

In ***Padley***, it was undisputed that the defendant actually consented to having her blood drawn. ***Padley***, 354 Wis. 2d 545, ¶11. At issue, was whether Padley's consent was voluntary. ***Id.***, ¶12. We rejected her argument that her

[5] Mitchell additionally urges that WIS. STAT. § 343.305(3)(b) should not apply where police have time to obtain a warrant. Because "the warrant process would not have significantly increased the delay before the blood test could be conducted," he maintains Jaeger was required to obtain a warrant. He grounds his argument in "public policy" and the Supreme Court's exigent circumstances analysis in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). However, because the State has conceded that the blood draw was not justified by exigent circumstances, this argument need not be addressed. The real issue is whether Mitchell consented to the blood draw. If he did, the practicality of obtaining a warrant is immaterial; the search would be justified under the consent exception.

consent was coerced, concluding that the implied consent statute offered Padley a choice between consenting to the blood draw or withdrawing her "implied consent" and facing the statutory penalties. ***Id.***, ¶27. Although this choice was difficult, we concluded that it passed constitutional muster. ***Id.*** In our discussion, we explained the meaning of "implied consent" in a manner that affects this case.

> On occasion in the past we have seen the term "implied consent" used inappropriately to refer to the consent a driver gives to a blood draw at the time a law enforcement officer requires that driver to decide whether to give consent. However, actual consent to a blood draw is not "implied consent," but rather a possible result of requiring the driver to choose whether to consent under the implied consent law.
>
> There are two consent issues in play when an officer relies on the implied consent law. The first begins with the "implied consent" to a blood draw that all persons accept as a condition of being licensed to drive a vehicle on Wisconsin public road ways. The existence of this "implied consent" does not mean that police may require a driver to submit to a blood draw. Rather, it means that, in situations specified by the legislature, if a driver chooses not to consent to a blood draw (effectively declining to comply with the implied consent law), the driver may be penalized....

Id., ¶¶25-26. In other words, implied consent (at least in that scenario) was not actual consent, but a choice between two alternatives: consent or face statutory penalties.

We also took the time to "address some confusion in the arguments of the parties regarding the implied consent law." ***Id.***, ¶37. Of particular note, we explicitly rejected the State's argument that "implied consent ... is still consent." ***Id.*** The contention that "'implied consent' alone can 'serve as a valid exception to the warrant requirement'" was, we stated, "incorrect." ***Id.*** We explained, "It is incorrect to say that a driver who consents to a blood draw ... has given 'implied

consent.'" ***Id.***, ¶38. Rather, in that circumstance "consent is *actual* consent, not *implied* consent." ***Id.*** (emphasis added). We further reasoned that "the implied consent law is explicitly designed to allow the driver, and not the police officer, to make the choice as to whether" to give consent. ***Id***, ¶39. Said another way, implied consent is not really consent; it "does not authorize searches." ***Id***, ¶40. Rather, it is a legal trigger that authorizes law enforcement to require a choice: actually consent or face sanctions. ***Id***, ¶40. We acknowledged tension between this view of implied consent and the statute's clear statement that "implied consent is deemed the functional equivalent of actual consent" for unconscious drivers under certain circumstances. ***Id.***, ¶39 n.10. However, we left resolution of that "tension" for another day. ***Id.*** Though the discussion in ***Padley*** was based on it's statutory application to conscious drivers, the case still sets forth two broad propositions of law: (1) consent is given (or "withdrawn") at the time the officer reads the Informing the Accused form, and (2) "implied consent" does not by itself satisfy the consent exception.

Several years prior to ***Padley***, we addressed the implied consent statute in ***Wintlend***. In that case, we were faced with the same scenario as ***Padley***: a motorist was stopped for OWI, was read the Informing the Accused warnings, and consented to a blood draw. ***Wintlend***, 258 Wis. 2d 875, ¶2. As in ***Padley***, Wintlend argued that although he consented to the blood draw, his consent was not voluntary.

Critical to whether Wintlend's consent was coerced was the question of the precise time "coercion rears its head." ***Wintlend***, 258 Wis. 2d 875, ¶14. In other words, when did Wintlend consent for Fourth Amendment purposes? Wintlend maintained (like our later decision in ***Padley***) that he consented at the time the officer read him the Informing the Accused warnings. ***Id.*** He further

argued that his consent was coerced because he was forced to choose to either consent to a blood draw or face suspension of his license. ***Id.*** We rejected his arguments. Relying on ***State v. Neitzel***, 95 Wis. 2d 191, 289 N.W.2d 828 (1980)—a case not addressing the consent exception or the Fourth Amendment—we reasoned that WIS. STAT. § 343.305 provides that "when a would-be motorist applies for and receives an operator's license, that person submits to the legislatively imposed condition that, upon being arrested for driving while under the influence, he or she consents to submit to the prescribed chemical tests." ***Wintlend***, 258 Wis. 2d 875, ¶12.[4] Thus, for Fourth Amendment purposes, "the time of consent is when a license is obtained," not when confronted with the Informing the Accused warnings. ***Id.***, ¶¶12-14.

We further concluded that the implied consent given when a license is obtained is actual, Fourth Amendment consent, and that such consent is voluntary. ***Id.***, ¶¶13-14. We explained:

> [I]t stands to reason that any would-be motorist applying for a motor vehicle license is not coerced, at that point in time, into making the decision to get a license conditioned on the promise that if arrested for drunk driving, the motorist agrees to take a test or lose the license.

Id., ¶13. Because there was no unconstitutional coercion, we concluded that Wintlend's implied consent—which he gave as a condition of receiving a license—satisfied the consent exception. ***Id.***, ¶¶1, 19. Again, two critical points

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[4] Here too we conceded some tension. The conclusion that implied consent takes place when a person obtains his or her license does not sit comfortably with the plain language of WIS. STAT. § 343.305(2) that any person "who drives or operates a motor vehicle upon the public highways ... is deemed to have given consent." ***State v. Wintlend***, 2002 WI App 314, ¶15, 258 Wis. 2d 875, 655 N.W.2d 745. But we concluded that we were bound by our interpretation of ***State v. Neitzel***, 95 Wis. 2d 191, 289 N.W.2d 828 (1980). ***Wintlend***, 258 Wis. 2d 875, ¶14.

of reasoning emerge, both contrary to ***Padley***'s reasoning. First, the consent that matters for Fourth Amendment purposes takes place when a motorist obtains his or her license, and second, this statutory "implied consent" is sufficient to satisfy the consent exception to the Fourth Amendment.

Like ***Wintlend*** and ***Padley***, the issue here is whether the "implied consent" that is statutorily deemed to have occurred when a driver chooses to drive on a public road supplies voluntary consent to a blood draw for Fourth Amendment purposes under the conditions set forth in the law. Because Mitchell was unconscious at the time of the blood draw, the only possible way to conclude he consented is to hold that "implied consent" under WIS. STAT. § 343.305 is actual, Fourth Amendment consent. On this question, ***Wintlend*** and ***Padley*** offer, or at least strongly suggest, two different answers. ***Wintlend*** implies that the "implied consent" provided for in WIS. STAT. § 343.305 is actual, voluntary consent, at least so long as the suspect does not withdraw that consent. ***Padley***, on the other hand, explicitly rejected that position when it was offered by the State. The cases also disagree about when consent is given—an issue critical to whether consent is in fact given and voluntary. Neither case directly addressed our precise factual issue, but we cannot resolve this case without ignoring or modifying the differing analyses in ***Padley*** and ***Wintlend***.

Wintlend predates ***Padley*** and might arguably govern. *See* ***Marks***, 369 Wis. 2d 547, ¶78. But as we are unable to resolve conflicts in precedent, the proper course of action in this situation is to certify the question. ***Id.***, ¶79 (holding that the court of appeals may not "overrule, modify, or withdraw language from a previously published decision" and a court of appeals decision "that a case impermissibly modified an earlier case and is thus not binding is effectively the

same as overruling that case"). We ask the Wisconsin Supreme Court to accept certification and provide clear guidance to the bench, the bar, and the public.

R. 86

SCANNED

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STATE OF WISCONSIN CIRCUIT COURT SHEBOYGAN COUNTY

State of Wisconsin,

Plaintiff,

v.

Gerald P. Mitchell,

Defendant.

Waiving Suppression

MOTION HEARING

Case No. **13 CF 365**

Court Official: Honorable Terence T. Bourke

Date of Proceeding: **October 16, 2013**

COPY

APPEARANCES

The Plaintiff appears by

Assistant District Attorney Nathan Haberman

The Defendant appears in person with

Attorney Charles Wingrove

TRANSCRIPT OF PROCEEDINGS

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THE COURT: This is case number 13 CF 365, State versus Gerald Mitchell. He's here with Attorney Charles Wingrove. Nathan Nahrwold is here for the State.

This is a motion challenging the blood draw. And Mr. Wingrove, apparently you just handed me something. Does this relate to this motion?

ATTORNEY WINGROVE: Yes it does, Your Honor. When I had first appeared with Mr. Mitchell and advised the Court we were going to bring a suppression motion, I also advised the Court that relying on DNS 92 and 42 CFR part two, we were going to argue that the proper procedure is to disclose the information from the hospital, those records, hasn't been followed, and that becomes another reason for suppression.

THE COURT: So it really has nothing to do with the facts behind the motion.

ATTORNEY WINGROVE: It's -- I hope to develop a very few facts at the hearing in support of it. And it's just another way of addressing the issue of they should have got a warrant for the blood draw.

THE COURT: All right. Mr. Nahrwold, go ahead.

ATTORNEY NAHRWOLD: Thank you, Your Honor. The State would call Officer Alexander Jaeger.

** OFFICER ALEXANDER JAEGER, **

called as a witness, having been first duly sworn, was examined and testified as follows:

COURT CLERK: State your name and spell your last name.

THE WITNESS: Officer Alex Jaeger, J-A-E-G-E-R.

THE COURT: Go ahead please.

DIRECT EXAMINATION

BY ATTORNEY KASSENBORG:

Q Mr. Jaeger, how are you employed, sir?

A City of Sheboygan police officer.

Q And how long have you been a police officer for with the City of Sheboygan?

A At the City about five years.

Q So you have any other law enforcement experience beyond the City?

A I have approximately three years prior with the Sheboygan County Sheriff's Department as a patrol deputy.

Q So is that about eight years in total?

A Yes.

Q And in your eight years of law enforcement experience have you conducted investigations regarding people who are intoxicated due to the

consumption of alcohol or other drugs?

A Yes.

Q And what is your training regarding that?

A State certification in the administration of standardized field sobriety tests.

Q And have you in your training received the certification using the National Highway Transportation Safety Administration standard?

A Yes.

Q And as part of your law enforcement career about how many investigations have you been involved in that surround an OWI?

A Involved in? I would say well over two hundred.

Q And are you trained to use the preliminary breath test?

A Yes.

Q Directing your attention to May 30, 2013, at about 3:17 p.m. did you receive a dispatch?

A Yes I did.

Q And you were working at this time as a law enforcement officer?

A Yes.

Q And what was the dispatch in regards to?

A Check welfare complaint.

Q And where were you supposed to go?

A An address on North 7th Street near -- correction -- North Eighth Street near St. Clair Avenue. I don't recall the specific address number.

Q In any event that's in the city of Sheboygan, county of Sheboygan, state of Wisconsin?

A Yes.

Q And what information were you provided with prior to arriving there?

A Check welfare complaint, checking the welfare of a male subject.

Q Were you given a name?

A I don't recall if I was specifically given a name at that time.

Q And when you arrived at that location near North Eighth Street and St. Clair, who did you speak to, if anyone?

A I spoke with the complainant, Alvin Swenson.

Q What did Alvin indicate to you about the person's welfare?

A Alvin indicated that he had received a telephone call from Gerald Mitchell's mother concerned about his safety as he had made a statement about his personal well-being to her. Alvin further went on to tell me that he shortly thereafter went to his

window and observed Mr. Swenson -- I'm sorry -- observed Mr. Mitchell exiting the apartment behind where he lives, and he appeared to be very disoriented.

Q Did Alvin describe the nature of his relationship or familiarity with Mr. Mitchell?

A Yes. He said the two had recently resided together.

Q And what did Alvin describe about what he observed involving Mr. Mitchell's activities?

A He said that Mr. Mitchell had in his words appeared intoxicated or under the influence, was stumbling, had thrown a bag of garbage into the backyard and had great difficulty in maintaining balance, nearly falling several times before getting into a gray minivan and driving away.

Q And --

[redacted]: I'm going to object. I understand this is for a probable cause determination, so I'm assuming it's not being offered for the truth of the matter asserted, just that's what Mr. Swenson said.

[redacted]: Well, Judge, even if it is offered for the truth of the matter, hearsay doesn't apply at this kind of motion hearing. It is a motion under 900.04, and it's a question concerning the admissibility of evidence.

So the Court is not bound by the rules of evidence, and that would include hearsay.

THE COURT: I got to say you two are both talking over my head. Start again, Mr. Wingrove.

ATTORNEY WINGROVE: I was assuming that the testimony's being offered for the purposes of establishing probable cause.

THE COURT: That's correct.

ATTORNEY WINGROVE: Then I was going to mak a point that it shouldn't be received for the truth of the matter asserted. This step of the hearing, as I see it, is about whether the officer developed enough facts to get probable cause to arrest the defendant.

THE COURT: So. I agree with that. What's your objection to that, Mr. Huberman?

ATTORNEY HUBERMAN: Your Honor, I think it can be offered for the truth of the matter and, that is, did Alvin say that and did Alvin see that. And the reason it c be offered for that is because the hearsay rule doesn't appl at this type of hearing because it's a question concerning the admissibility of evidence.

THE COURT: Right. But I can't make a finding that Mr. Mitchell's drunk because of what Alvin Swenson said.

ATTORNEY HUBERMAN: It's not going to be th

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only fact, but it could be a factor.

THE COURT: I know. I think you two are talking about different issues.

ASSISTANT PROSECUTOR: Okay.

BY ASSISTANT PROSECUTOR:

Q Officer, after you received that information from Mr. Swenson, were you able to communicate with other law enforcement officers and locate Mr. Mitchell?

A Yes.

Q And tell me about how soon after your conversation with Mr. Swenson did you locate Mr. Mitchell?

A Approximately a half hour.

Q And describe how you came in contact with Mr. Mitchell.

A As I was outside in my squad, a community service officer who works for the Police Department was also in the area and had located a male subject matching the physical description that I had provided out to other officers walking towards us about a block, half a block away. He appeared intoxicated and was possibly bothering a female pedestrian.

Q And before -- I should have asked this question before we went to that one. Before you located

Mr. Mitchell did you have contact with his mother, Carol Mitchell?

A Yes.

Q And what was the nature of that contact?

A I was concerned about the statement that Mr. Swenson had said. He had told me that his mother had called him concerned about a conversation she had with Mr. Mitchell over the phone. He made some vague statements about potentially harming himself, and she was concerned about that. And I also needed to obtain the vehicle information that she had -- I learned she had actually owned the van that Mr. Mitchell had driven away in, and she provided me a license plate.

Q So the information that Ms. Mitchell provided you regarding a van that Mr. Mitchell drives, was that consistent, inconsistent, or something else with the information you received from Mr. Swenson about the van he observed the defendant get -- or Mr. Mitchell get into?

ATTORNEY WINGROVE: I'm going to object. That sounds like we're having one witness, one hearsay witness testify as to the credibility of another hearsay witness.

THE COURT: I didn't take it that way.

ATTORNEY WINGROVE: You're the judge.

THE COURT: Well, it's corroborating evidence. We're talking about the officer's state of mind for probable cause. I don't have any problem overruling your objection. So go ahead.

BY ATTORNEY HABERMAN:

Q Do you need me to ask that question again, Officer Jaeger, or do you understand that?

A Please ask again.

Q The description of the van that was provided by Ms. Mitchell, did that match, was that -- I'm sorry -- was that consistent, inconsistent, or something else with the description of the van that Mr. Swenson provided you?

A It was consistent, a gray van.

Q Okay. When you had contact with Mr. Mitchell, what did you notice about his demeanor?

A He was slurring his words, stumbling. He was wearing jeans but no shirt, was wet, and he had a large amount of sand on his body similar to if you had gone swimming in the lake.

Q Did the observations you made of Mr. Mitchell provide any indication to you about intoxication?

A Yes.

Q Describe that.

A He was slurring his words. He had great difficulty in maintaining balance, nearly fell several times to the point where another officer and myself had to extend our arms out to ensure he wouldn't fall. When the transition when I actually brought him across the street to the sidewalk area so we were out of traffic, he nearly fell after stepping up and over the curb. And he admitted actually that he had been drinking.

Q Do you see Mr. Mitchell in court today?

A Yes I do.

Q Can you describe him for the Court by what he's wearing and where he's seated please?

A Red jumpsuit at the defendant's table.

ATTORNEY HABERMAN: Your Honor, let the record reflect identification please.

ATTORNEY WINGROVE: We'll stipulate for today's purposes.

THE COURT: All right. Thank you.

BY ATTORNEY HABERMAN:

Q And Officer, you indicated the defendant made some statements about drinking. Describe that for us. What did he say?

A He admitted initially that he had been drinking.

He was drinking in his apartment. And would not tell me if he was drinking with anyone or who anyone -- who it would be that he was drinking with. And he said that he had been drinking just prior to our contact.

Q And as a result of his drinking what, if anything, did he say about the specific items he was drinking or numbers of drinks?

A He had later changed his story that he was drinking down at the beach, that he parked his car on Michigan Avenue because he felt he was too drunk to drive, and that he had four shots of vodka.

Q At that point had you received any information about any prior convictions for the defendant regarding operating while intoxicated?

A I don't recall if it was at that point or after.

Q At some point you received information about that.

A Yes.

Q Did the information about prior convictions factor into your decision on arresting him at all?

A Yes.

Q Correct me if I'm wrong, does that mean you received the information prior to the arrest?

A Yes.

Q Okay. Do you know -- if it wasn't at that moment,

do you know when it would have happened?

A Not specifically, no.

Q Did you have any other officer check for the gray van?

A Yes.

Q And was the gray van ever located?

A Yes it was.

Q Describe who did what.

A Officer Stephen had located the van parked on Michigan Avenue. I believe it was in the 300 block.

Q Were you provided any information about whether or not there was any damage to that vehicle?

A He indicated -- Officer Stephen did -- that there was some minor damage that appeared to be fresh I believe to the side mirror area.

Q And were you able to confirm that this is the same van that was discussed by Ms. Mitchell earlier?

A Yes. And that was by vehicle registration.

Q Okay. Did you have the defendant submit to any standardized field sobriety tests?

A No.

Q Why is that?

A Based on his current condition he was stumbling, could barely stand without being held, and I didn't

feel it would be safe for him to perform those tests.

Q Did you have any preliminary breath test performed?

A Yes.

Q When -- at what point was that done?

A Just prior to the arrest.

Q And would that have been then on the street where you had initial contact with him?

A He was actually brought over to the front of my squad car where I performed the test. Or administered the breath test.

Q I'm not sure if we established this earlier, but where in -- where did you have the contact with him?

A It was on St. Clair Avenue just east of the intersection of Eighth Street and St. Clair Avenue.

Q And that's, again, in the city of Sheboygan, Sheboygan County, Wisconsin.

A Yes.

Q And if someone were to walk from the lake to the location where Mr. Swenson described seeing Mr. Mitchell, would they have to go through the location that you guys were in?

A I'm sorry, can you repeat the question?

Q Sure. If someone's in Sheboygan -- you're familiar

with the city?

A Yes.

Q In Sheboygan if someone's down by the lake, near Michigan Avenue and the lake, if they want to get back to the area where Mr. Swenson described initially seeing Mr. Mitchell, and you said that Mr. Swenson was near Eighth and St. Clair looking out a window when he saw Mr. Mitchell, would they have to walk through the location where you currently are having contact with Mr. Mitchell to get there?

A Potentially. I mean, we were probably 30, 40 feet west of his residence where he actually was on the Eighth Street side, and the lake would be from his residence to the east, and he lives 700 block of St. Clair Avenue.

Q Okay. When you administered the preliminary breath test what was the result?

A .24.

Q As a result of the arrest and your observations -- as a result of the preliminary breath test and your observations of the defendant as well as his statements, what did you do?

A Make an arrest for operating while intoxicated.

Q And what, if anything, did you do next?

A He was placed in the back seat of my patrol vehicle, and I brought him to police headquarters for further processing.

Q Where is police headquarters?

A North 23rd Street in the city of Sheboygan.

Q And about how long generally would it take you to get from where you initially had this contact with Mr. Mitchell to the time you got to the Police Department?

A About five minutes maybe.

Q And what, if anything, did you notice about the defendant's condition during this time?

A It was declining.

Q What do you mean by that?

A He was becoming more lethargic in his movements, had greater difficulty in maintaining balance, had to be physically helped out of the squad car when we got there. And once he was in a holding cell with his handcuffs removed, he began to close his eyes and sort of fall asleep or perhaps pass out. But he would wake up with stimulation. And based on that condition, I didn't feel that a breath test would be appropriate. After talking to my lieutenant, we decided that a blood test would be more appropriate, and I brought him to Memorial

Medical Center.

Q And again, about how much time passes by the time you get to Memorial?

A From the time I left the police station?

Q Yes, sir.

A Eight minutes maybe.

Q And when you arrived at Sheboygan Memorial where was Mr. Mitchell at that point?

A He was in the back seat of my squad.

Q What, if anything, did you notice about his condition at that time?

A He appeared to be completely incapaciteted, would not wake up with any type of stimulation, and had to be escorted into the hospital by wheelchair. Myself and another officer had to lift him into the wheelchair as he could not hold himself up, would not wake up, and his eyes were closed.

Q Describe the efforts you made to try to wake him up.

A I would shake his arm, lift up his hands, shake his hands, rub the top of his head.

Q Did he make any statements to you?

A Not at that point, no.

Q And how did you get him from the squad car into Sheboygan Memorial?

A By a wheelchair. I pushed him.

Q And while he was in the wheelchair, what was his posture like?

A He was slumped over in the chair, could not lift himself up with any type of, like, sitting in a normal position.

Q And what did you do next?

A I completed the blood evidence paperwork. It's standard procedure. And I read him the Informing the Accused form verbatim from the form. He was so incapacitated he could not answer.

Q I'm going to have marked, Officer, Exhibit 1.

ATTORNEY WINGROVE: I think we should mark it as Exhibit 2 because I have an offer of proof I brought in as Exhibit 1 a while ago. Would just be a cleaner record.

THE COURT: That was brought in on a different day.

ATTORNEY WINGROVE: Absolutely.

THE COURT: Why don't we just call it 1A.

BY ATTORNEY HARRIMAN:

Q Officer, I stand corrected. I'm going to show you what's been marked as Exhibit 1A. Can you identify this, sir?

A Yes I can.

Q What is it?

A This is the Informing the Accused form, a copy of it, that I had read to Mr. Mitchell. After reading through the form, he was so incapacitated that he could not answer the question of "Will you submit to an evidentiary chemical test of your blood?"

Q And Officer, is that the actual form you completed in this case?

A Yes.

Q Exhibit 1A has several paragraphs here towards the top that are computer printed. Do you see that?

A Yes I do.

Q Did you read these paragraphs verbatim to the defendant?

A Verbatim, yes.

Q And when you got to the point of the second half or the lower portion of this form, is this your handwriting on the form?

A Yes it is.

Q And is that your signature in the lower right corner?

A Yes it is.

Q And is there an indication as to the date and time that this form was completed?

A Yes there is.

Q What is that?

A Dated 5-30 of '13 at 1724 hours.
Q And do you recall when your arrest was made?
A No I don't.
Q I'm going to show you what's going to be marked as Exhibit 2. Showing you Exhibit 2. Do you recognize this, sir?
A Yes I do.
Q What is that?
A This is the Alcohol Influence Report.
Q And did you complete that in reference to this case?
A Yes I did.
Q And is that your handwriting on the form?
A Yes it is.
Q Is that a true and accurate copy of the form that you completed in this case?
A Yes it is.
Q And in that form does it indicate your arrest time?
A Yes it does.
Q And what time is that?
A 4:26 p.m.
Q And when you compare your arrest time to the time of reading the Informing the Accused, what's the difference there?
A Approximately one hour.

Q Based upon your recollection of the incident, does that time frame sound about right from what you testified --

A Yes.

Q -- to in terms of the arrest, going to the Police Department, and then ultimately going to Sheboygan Memorial?

A Yes.

Q And what did you write down as a response on Exhibit 1A in reference to will he submit to an evidentiary chemical test?

A "Couldn't speak slash incapacitated."

Q And did you mark a box?

A Yes I did.

Q And what was the box?

A Yes.

Q And as a -- on Exhibit 2 of the Alcohol Influence Report, did you indicate anything in reference to the preinterrogation warning section? In other words, when you asked -- did you ask any questions about drinking history after he was arrested?

A No I didn't.

Q Why was that?

A He was incapacitated.

Q And is that indicated on Exhibit 2?

A Yes.

Q Now?

A I wrote the words "incapacitated" across the signature field.

Q Just so I am clear and the record's clear, when you say incapacitated, what are you talking about?

A He physically could not answer, was not awake, was not alert.

Q And Officer, did you summon the -- strike that. After reading the Informing the Accused and the defendant didn't respond, what happened next?

A Blood evidence was obtained by the phlebotomist at the hospital.

Q And did you call for any other assistance in relation to the defendant's physical status?

A I didn't specifically request it. I had made mention of his current condition to hospital staff. Perhaps the amount of time between the time of arrest and the time the form was completed I do recall that, you know, medical efforts were being attempted at the same time that I was waiting for the phlebotomist. I recall that Mr. Mitchell was so incapacitated and couldn't answer any hospital staff as I stood next to him as well and did not awake while they placed catheters or any other type

of medical instruments on him.

Q I'm going to show you what's been marked as Exhibit 3. And Officer, I want to clarify with you this Exhibit 3 before you go over and identify it. You can see Exhibit 3 is two pages. It's a front and back, right?

A Yes.

Q The front I'm going to ask you to talk about. The front is identified as having the exhibit sticker. The back I'm not going to ask you any questions for. It's unfortunately just a lack of doing a good job of copying on my part.

ATTORNEY WINGROVE: And just so the record is clear, we would for reasons I'll explain otherwise, we would object to the back part of the document being received into evidence.

THE COURT: What is Exhibit 3?

ATTORNEY WINGROVE: That would be the WSLH laboratory report.

THE COURT: Do we really need the lab report?

ATTORNEY HABERMAN: What Attorney Wingrove -- the lab report is the part that we're not going to talk about.

ATTORNEY WINGROVE: Why don't I give you my file copy of that document, and it won't have the lab report

on the back of it, and I'll just trade you if that's acceptable.

BY ATTORNEY HABERMAN:

Q I'm going to reshow you what's been remarked as Exhibit 3 so we don't have this problem of a back side of a page. Do you recognize Exhibit 3, sir?

A Yes I do.

Q What is that?

A This is the State of Wisconsin Blood/Urine Analysis form that is completed during the blood draw.

Q And in fact, do you complete part of that form?

A Yes I do.

Q What part?

A The upper portion, parts that are listed A, part B, and part C.

Q And is this the form that you completed in this case?

A Yes it is.

Q At what point in the process do you complete this form?

A Just prior to the blood draw.

ATTORNEY WINGROVE: And again for the record I have no objection to the form being received for what the officer did and what he said. But the parts of the form that are filled out by someone else, we would be objecting to them

being received as I don't think the appropriate steps have been taken for that information to be disclosed or redisclosed.

THE COURT: I really don't understand why there's an objection. I think all we're here today is whether or not there was a violation of Mr. Mitchell's rights when the blood was drawn. Isn't that the whole issue?

ATTORNEY WINGROVE: Yes. But again, I'm going to take this in a slightly different direction and suggest that the blood draw made at the hospital by the hospital staff under the facts and circumstances as they then existed is subject to confidentiality under the federal rules brought by 92 DHS.

THE COURT: I'm hesitating because that's -- as I read your motion, that's not what I understood this to be today.

ATTORNEY WINGROVE: That is correct. The motion is a straight suppression motion. But I did alert the Court that I was going to be making this argument, and this is an extension of the motion saying they should have had a warrant to get that blood. And now the argument's going to be because that blood draw is subject to federal confidentiality rules.

THE COURT: I'll receive it the way it is. I've never had a motion like this before. I'll receive the

exhibit as it stands. If I look at it and I see something in the document that appears that it should not have been admitted, then I'll reconsider, but I'll accept it the way it stands.

ATTORNEY WINGROVE: I understand the ruling. I just ask the record reflect a continuing objection.

THE COURT: That's fine.

BY ATTORNEY HABERMAN:

Q Officer, are you present when anyone else completes parts of that form?

A Yes.

Q And what part would that be?

A Part D and part E.

Q And what is part D generally?

A The type of specimen that is being collected, the collection date, and the collection time.

Q And the person collecting is on there too?

A Yes.

Q And what's the person's name on the form?

A Jennifer Gatzke.

Q Was -- based on your recollection was that the person who collected the blood in this case?

A Yes it was.

Q And is there a time that's indicated as to when the blood was collected?

A Yes there is.

Q When is that?

A 1759 hours.

Q Based on your recollection and your presence during completing this form and Ms. Gatzke completing this form, is that time accurate?

A Yes it is.

Q When -- did Ms. Gatzke collect the blood of the defendant?

A Yes.

Q And was that blood turned over to you?

A Yes it was.

Q Okay. Do you recall what was going on at the time that the blood draw was being performed in terms of medical treatment, if any?

A At the specific time I believe he was just being monitored at that time. I don't know of any other medical procedures being done.

Q You mentioned at one point in your testimony about a catheter. Do I understand right?

A Yes.

Q Okay. Tell me about what happens when you're at the hospital then. Take me through this to the blood draw moment. Do other hospital staff get involved in medical treatment prior to the blood

draw?

A Yes.

Q Okay. Tell me about what you saw generally. I'm not interested in the very specifics, but who's doing what at what time?

A I recall specifically one nurse inserting a catheter into his penis attempting to obtain a urine. Other than that I'm not a medical professional. I don't recall specifically what other procedures were done.

Q Were people working on him other than that?

A No. They were basically just monitoring him during that time frame.

Q And I just want to make the record clear on this 'cuz I'm just trying to picture this in my mind. When you guys arrive at the hospital, is it like you're going to an emergency room treating someone who has just been injured, or is it like you're doing an OWI investigation, or something else?

A Doing an OWI investigation. However, it was unusual that he was incapacitated to the point that he was. Medical staff were monitoring his condition. They were certainly aware of his condition. And -- yeah.

Q Did you guys go into an emergency room, or did you

go into a different room where a blood draw is done?

A This is done in an emergency room where typically all the other emergency -- I'm sorry -- the emergency room is used for the blood draws itself.

Q Okay. You went to the room where the blood draws are normally done.

A They're typically done right in the room we go in. It's -- typically there's one room we usually use. However, we were in the room next to that one because of his condition.

Q Okay.

ATTORNEY HABERMAN: I don't have anything further, Judge.

THE COURT: Thank you. Mr. Wingrove.

CROSS-EXAMINATION

BY ATTORNEY WINGROVE:

Q First I want to ask you some general questions about Alvin Swenson. Do you know Mr. Swenson at all?

A Yes. I've met Mr. Swenson.

Q How many times?

A Once I believe

Q Did you have any other knowledge from Mr. Swenson you gained from other law enforcement?

A I've known of Mr. Swenson through other investigations that I was part of, but I never met him as a result.

Q Okay. And when you say you met him once, you mean this occasion on May 30th?

A Yes.

Q Okay. What generally did you know of Mr. Swenson? Did you know if he was reliable?

A I don't have an answer for that question.

Q Did you know if he was a criminal?

A I was involved in criminal investigations with him.

Q What were the nature of those investigations?

ATTORNEY HABERMAN: Judge, I'm going to object to irrelevant for today's purposes.

THE COURT: I think the question is relevant to a point. But it goes to Mr. Swenson's credibility and what the officer knew about Mr. Swenson.

THE WITNESS: Could you repeat the question?

BY ATTORNEY WINGROVE:

Q Did you know if Mr. Swenson was a criminal?

A Yes. I know he had been arrested.

Q Do you know whether he's been convicted?

A I don't recall specifically.

Q Do you know how many times? I'm sorry. I withdraw the question.

When you went to speak with Mr. Swenson, did you know where he was living?

A Yes.

Q What was -- what's your understanding of where he's living?

A It's a temporary living facility.

Q For what sort of individual?

A People that are released from jail.

Q Did he appear to be under the influence of any intoxicants?

A Not that I noticed. I'm assuming you mean Mr. Swenson?

Q Yeah. I'm sorry. Thank you. Yes.

A Okay.

Q What was his mannerism like when you spoke to him?

A He seemed genuinely concerned for Mr. Mitchell.

Q What does that mean? Was he excited? Was he sad? Was he happy? Was he talking fast? Was he talking slow? What were his mannerisms like?

A He was legitimately concerned. He really wanted us to go out and find him and make sure he was okay. He stressed that to us several times.

Q Now, you've been involved in numerous OWI investigations, right?

A Yes.

Q You received training in OWI investigations, right?
A Yes.
Q You said you went to try to wake Mr. Mitchell up at one time, right?
A Yes.
Q What did you do?
A I shook him several times, shook his arms. Called his name.
Q Did you attempt a deep sternum rub?
A I don't believe so.
Q Is that one of the things you're trained to do?
A I don't believe I was ever trained to do that.
Q Have you ever done that?
A Not -- I mean, I've rubbed people's chests before but -- I mean, I'm not trained in the deep sternum rub that you're asking about.
Q Is that typically used to arouse unconscious people?
A It can be.
Q Have you taken anyone in to a 51.15 emergency detention in Sheboygan?
A Yes.
Q Where do you take them to?
A Memorial.
Q How about 51.45? Have you done one of those, an

alcohol detention?

A Yes.

Q Where do you take 'em to?

A Memorial.

Q Now I want to direct your attention to May 30th and just try to build a time line for a minute here if we may. You were dispatched at about 3:17, correct?

A Yes.

Q You probably arrive within about five minutes. That's consistent with your testimony at the preliminary hearing, correct?

A Correct.

Q How long did you speak to Mr. Swenson for?

A I don't recall specifically.

Q Okay. Well, let's try it this way. Say you got there about 3:22, 3:25. How soon -- when did you get the call from the community service officer?

A That was after I had talked to Mr. Swenson. I was out in my patrol car trying to find investigative information, perhaps a license plate, providing a text message on a computer or over the radio to other officers to assist in locating him.

Q So you're doing that for a while?

A It took a few minutes, yes.

Q About how long?
A I don't recall. I also had a conversation with Mr. Mitchell's mother at the same time trying to gain information from her.
Q When did you first have contact with Mr. Mitchell?
A After the CSO had informed me of the suspicious individual.
Q Okay. And according to the -- I think it's Exhibit 2 -- you arrested Mr. Mitchell at 4:26. How much time did you spend with Mr. Mitchell talking to him before you arrested him?
A I don't recall specifically.
Q You think it would have been a half hour?
A I don't think that long, no.
Q Less than a half hour.
A I would think so, yes.
Q Okay. And if I told you that I reviewed the video and you put him in the back of the squad car at about 4:15, that would be consistent?
A If that's what the video said.
Q You wouldn't dispute that.
A If that's what the video says I wouldn't.
Q Okay. And then you take Mr. Mitchell to the police station. Do we know what time we arrived?
A No I don't.

Q How long were you at the hospital before you read him the Informing the Accused?
A I don't recall specifically.
Q There was some mention about the room the blood draw was done in. Is that done in the ER?
A Yes.
Q Okay. Is the ER one big room, or is it a large room with little rooms facing off of it?
A One room with a lot of little rooms facing off of it.
Q Okay. And the blood draw wasn't done in the usual blood draw room owing to Mr. Mitchell's medical condition, right?
A Yes.
Q And the medical condition was that he was unconscious, right?
A Yes.
Q And he was admitted to the hospital, correct?
A Yes.
Q And you testified that you saw at 1759 the blood draw was performed, right?
A Yes.
Q And that was about 35 minutes after you read the Informing the Accused to Mr. Mitchell, right? It's math.

A Yeah.
Q 1724, 1759. The phlebotomist was an employee of the hospital, right?
A Yes.
Q And did she put identifying information on the blood sample she drew?
A On the samples itself, the tubes?
Q Yeah.
A I believe she initials the tape that's on there.
Q And was there some sort of identifying information for Mr. Mitchell put on those? I mean, there's got to be some way to track it, right?
A Yeah.
Q So did you see that happen or not?
A I don't recall specifically, no.
Q But it's your understanding that customarily happens, right?
A I believe so, yes.
Q To establish a chain of custody. That would be correct, right? That's why that happens?
A Yes.
Q You could have gotten a warrant to draw Mr. Mitchell's blood at the hospital, couldn't you have?
A I could have applied.

Q I'm sorry. Yes. You could have applied, correct?
A I suppose.
Q Police do that on a fairly regular basis, don't they?
A Now yes.
Q How long does it typically take?
A I don't know. I haven't done a warrant blood draw yet. We just started doing those.
Q It's fair to say that you watched Mr. Mitchell's condition deteriorate in front of you, right?
A Yes.
Q So if there was some sort of blood alcohol or drug curve going on, the numbers were probably getting higher, not lower, right?
A I don't know that.
Q He got sleepier and sleepier and eventually passed out in front of you, correct?
A In the back of my squad, yes.
Q Okay. Do you know if Mr. Mitchell was eventually admitted to the ICU at Memorial?
A Yes.
Q Was he?
A Yes.
Q Okay. Do you know if he was eventually admitted to 1-K at Memorial?

A That's my understanding.
Q That would be a yes?
A Yes.
Q Just a moment please while I go over my notes. Okay. And the reason you take people for emergency detentions or emergency alcohol detentions to Memorial is because that's where we take them in Sheboygan County, right?
A Yes.
Q Okay. Just a few odds and ends to clean up now please. There was some questioning on direct examination that in order for Mr. Mitchell to come back to his apartment from the lake, he would have to walk through an area where you were standing. Do you sort of remember that?
A Yes.
Q Okay. Is it fair to say -- what direction was Mr. Mitchell moving when you saw him, first saw him?
A From the north to the south.
Q Okay. So that would have been sort of parallel to the lake, correct?
A Yes.
Q So it's possible he could have come back from the lake and taken some other street other than the

street you were standing on, right?

A Yes. I did not see him on St. Clair Avenue.

Q And there's other ways to get from the lake to where you saw him than just St. Clair Avenue, right? There's a lot of other streets.

A Yes. St. Clair would be the most direct.

Q You testified when you got back to the station you spoke with your supervisor, and you decided a blood draw would be more appropriate. You remember that?

A Yes.

Q Why?

A Because of his current condition.

Q That being that he was unconscious?

A He was not unconscious quite. I mean, he was closing his eyes, and I mean, he was arousable.

Q Okay. If he was going progressively downhill in front of you, why didn't you read him the Informing the Accused at that time?

A I don't know.

Q Were you at that time concerned that he was going to pass out?

A It was a concern.

Q Okay. One last point. You had testified that Mr. Mitchell later changed his story.

A Yes.

Q You asked him questions about drinking down at the lake, right?

A Yes.

Q And he admitted to drinking down at the lake, right?

A Not initially, but yes. That's what he had changed his story to.

Q And that was the change in the story?

A Yes.

Q And you don't know whether he walked back from the lake or drove back from the lake, do you?

A He told me that he parked his car on Michigan Avenue 'cuz he was too drunk to drive.

Q And you don't know whether that was before or after he went to the lake.

A No.

Q You said he parked it by the lake. I figured I was too drunk to drive. But you don't know whether he got drunk before or after he parked his van, right?

A Right.

Q And he said he was drinking in his apartment, but you don't know whether he was drinking in his apartment before or after he went to the lake, right?

A He was -- I'm sorry, can you repeat the question?

Q Sure. Mr. Mitchell said he had been drinking in his apartment, right?

A Yes.

Q And you don't know whether he was drinking in his apartment before or after he went down to the lake.

A I don't believe he was in his apartment during the time of my investigation.

Q That's because you knocked on the door and he didn't answer the door, right?

A Right.

Q And later on in your investigation it became pretty clear that he really didn't want to talk to a police officer, didn't it?

A Right.

ATTORNEY WINGROVE: No further questions. Thank you.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY ATTORNEY HABERMAN:

Q Did you ever receive, Officer, any information after Mr. Swenson provided you the information of the defendant getting in his gray van? Did you receive any information after that to suggest that the gray van never returned?

A No.

Q Approximately how far in blocks or however you want to characterize it is the location of where Mr. Swenson observed the gray van near Eighth and St. Clair in relation to the 300 block of Michigan where the van was found?

A Four or five blocks.

ATTORNEY HABERMAN: I don't have anything else then, Judge.

THE COURT: Anything else on that?

ATTORNEY WINGROVE: No. Thank you.

THE COURT: Thank you, sir.

ATTORNEY HABERMAN: Your Honor, for the record I move for the admission of Exhibit 1A, 2, and 3.

THE COURT: Any objection?

ATTORNEY WINGROVE: I just ask the record reflect the previous objections I made, especially to the portions of the blood draw filled out by the hospital employee.

THE COURT: So noted. But they're received. Anything else, Mr. Haberman?

ATTORNEY HABERMAN: No evidence, Your Honor.

ATTORNEY WINGROVE: Just argument, Your Honor.

THE COURT: All right. Mr. Haberman, go ahead please.

ATTORNEY HABERMAN: Thank you, Your Honor. I outline the gist of my argument in my brief to the Court dated October 14th. This is a blood draw pursuant to the implied consent law under 343.305. It is lawful pursuant to that. The fact that this was a blood draw done under the implied consent law means that this was a lawful blood draw and the evidence is lawfully obtained.

Missouri v. McNeely has absolutely nothing to do with this case. In the implied consent law under subsection 343.305(3)(b), a person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent. So we have the status of the law as presuming someone has given consent. And just because their state becomes unconscious or not capable of withdrawing consent doesn't change the fact that they have agreed to have their blood drawn as part of Wisconsin law. Therefore, a blood draw once a person is unconscious pursuant to the implied consent law is still lawful.

We do need to look at a couple decisions to interpret unconscious operator as well as otherwise not capable of withdrawing consent. And that is generally *State v. Disch*, 129 Wis.2d 255 [sic] as referenced in my brief. It is in that case that the phrase unconscious is defined as (as read) "a person who is insensible, incapable of responding to sensory stimuli, or in a state lacking

conscious awareness." That is from page 234.

That is what we had here. That meets the definition as described by Officer Jaeger of the defendant's state. He would further, I guess, could be characterized as otherwise not being able -- otherwise not capable of withdrawing consent, but I think it's more accurate to describe him as unconscious under the definition provided under *Disch*. Although the otherwise is described as (as read) "a person who has conscious awareness and can respond to sensory stimuli but lacks present knowledge or perception of his or her acts or surroundings." There was a discussion in *Disch* about that as well as *Hagaman*, H-A-G-A-M-A-N, which is referenced in my brief.

The bottom line is in this case the defendant was unconscious. It should be noted that in *Disch* the Court -- the Wisconsin Supreme Court said that the officer does not have to provide the information in an Informing the Accused form to a person who is unconscious 'cuz it doesn't serve any means at that point. The officer did do that though here, and that is, I guess, certainly to his credit as he was doing his best to comply with the complied consent law.

Once there was no response the officer could lawfully conduct a blood draw and, in fact, follow the standard procedures that the Court and everyone is familiar with regarding an OWI investigation. There was a blood draw

pursuant to the blood draw paperwork that is typically used, and the blood draw procedure was followed.

There's nothing to suggest this was a forced blood draw. There is nothing to suggest that this is a blood draw on a exigent circumstances situation when there has been a concern for exigency. This is not that case. It's not *McNeely*. It's not *Schmerber*. And it's not *Bohling* in Wisconsin.

Based upon the status of the defendant at the time this was a lawful blood draw. There's nothing about this blood draw that has suggested it was through some other hospital means or hospital record obtaining means. Any such argument I think is merely speculation by the defense.

And on a side note, I would object to the argument about this. I don't think it's properly before the Court. I think the argument about this administrative code in DHS and confidentiality, once the defense filed their brief and cited *McNeely* as their authority to suppress this evidence, I don't think that this issue's appropriately before the Court.

If Attorney Wingrove was, I think, sincere about saying this is really where the issue is, then that should have been included as his authority in his brief, and it should have been articulated in advance to the Court rather than walking into the motion hearing and saying, here's some Administrative Code printouts from Westlaw, and here is my

argument. So I think that that issue is inappropriately before the Court.

That being said, it's a separate concept and distinct from this lawful way of obtaining blood evidence which is done in this case pursuant to the implied consent law.

THE COURT: Thank you. Mr. Wingrove?

ATTORNEY WINGROVE: Thank you. I guess to respond to the last argument first, I did tell the State and the Court I was going to proceed down this path when I first appeared. I received the State's position 48 hours ago, and that precluded me from -- you know, this is the next step. I'm going to file this. I look for them to argue implied consent. Then I'm going to go down this path. It's a logical progress there. If it needs to be briefed, great, it needs to be briefed. If the Court wants me to file a motion on it, I can do that. I can get the transcript from today. I can use that as my evidence.

With that said, we have a warrantless blood draw. They could have got the warrant. They didn't. There were no exigent circumstances. They're arguing implied consent. Okay.

Two basic problems with implied consent as I see it. The first and most significant one is if a police officer's confronted by someone who is gradually losing consciousness,

why not give him the Informing the Accused when he asks him to do the field sobriety. That way the issue's out there. That way you get it taken care of. The officer clearly knows this guy is deteriorating and going down in front of him. Somewhere along the line he should have, could have, should have done that. It would have been proper, would have been appropriate.

I'm also a little bit concerned on the implied consent on the blood draw because apparently there was, like, a 35-minute delay between reading the Informing the Accused and having the blood draw occur.

And I'm sorry, I need to digress for a moment. The implied consent cases the State relies upon talk about a situation where the officer comes upon an unconscious person. That's not this case. In this case the officer is talking to the person. The officer is asking him questions, asking him to perform field sobriety tests. So that distinguishes those cases and gives this case a different posture.

The last thing that we have is the blood draw that was made. The blood draw was made by a hospital employee. It's a facility that receives people under 51.15 and 51.45. That my client was obviously a patient at the time 'cuz he was receiving treatment. Any identifying information from the hospital as a treatment record, that would include his name on the blood vial, and they're all subject to federal

confidentiality laws under 92 -- DHS 92, and there is a procedure for the disclosure of that information. And that's set under 42 CFR part two, 2.65. And I've given the Court a copy of that. That procedure wasn't followed. There's another procedure for investigations, but that can't be used in a criminal prosecution.

And finally, if that information is disclosed -- and this is on the last page of the information I've given the Court -- it's a crime to disclose or redisclose that information.

And that information has been disclosed. It has been redisclosed. And frankly, if the State -- I don't think intentionally or maliciously -- but is doing things that are criminal, that's a violation of my client's rights under the Eighth and Fourteenth Amendment to the U.S. Constitution. And the results from that test should be suppressed.

So for all those reasons we would ask that the warrantless blood draw be suppressed 'cuz in the alternative, what they could have done, what they should have done is applied for the warrant and avoided all this other issues that come up on a -- what ends up being a direct admit to a mental health treatment facility. And the testimony was clear. He passed through the ICU to 1-K.

So for all those reasons we ask the evidence from the blood draw be suppressed. And I would note in making

that request that's not going to prevent the State from going forward with this case.

THE COURT: All right. Thank you. Well, regarding the warrantless blood draw, I think the State is correct in their position. And I read the *Disch* case after I got Mr. Haberman's brief. And I find that it gave ample support for the State's position that no warrant was required because Mr. Mitchell was unconscious.

The officer's testimony was that he took Mr. Mitchell after the arrest to the Police Department. Mr. Mitchell was -- it sounded to me like he was kind of with it initially, but he was deteriorating. And they get to the police station, and they're not sure that he can submit to a breath sample. So they take him to the hospital. And on the way to the hospital, he deteriorates to the point where he cannot be shaken awake. To me that's unconscious.

And the law -- when I refer to the law I'm referring to 343.305(3)(b) -- makes clear that an unconscious operator has -- cannot withdraw their consent to a blood sample. The only issue really regarding the warrantless draw is whether or not there is probable cause. That's the threshold question to whether or not you can do the blood sample.

And I find there is probable cause. I think the way the whole investigation went down -- I'm not being critical of anyone because the officer's just following his leads, and

there's really no one other than Mr. Swenson who saw Mr. Mitchell driving. And so there may be proof problems for the State in the long run. But as far as probable cause, I don't have a problem with finding probable cause.

Mr. Swenson said that Mr. Mitchell was drinking. He got into a car. That's what he advised the officer. The officer had contact with Mr. Mitchell's mother to help identify the vehicle. Eventually he finds Mr. Mitchell within the hour, and Mr. Mitchell is very drunk. And he made the comment that he was -- I can't recall precisely what it was, but it was to the effect that he was too drunk to drive. I don't have a problem with probable cause.

Now, as far as the other issue that came up today, I'll entertain it. I agree with Mr. Haberman that notice was faulty. But I feel comfortable proceeding.

And I'm looking at the section that Mr. Wingrove provided to me. That's 42 CFR Chapter 1, Section 2.3(a), and that's Purpose. I'll read what it says. (As read) "Under the statutory provisions quoted in Sections 2.1 and 2.2, these regulations impose restrictions upon the disclosure and use of alcohol and drug abuse patient records which are maintained in connection with the performance of any federally assisted alcohol and drug abuse program."

There's no allegation that what happened was part of a drug abuse program. This is a simple OWI -- don't

interrupt me. I know you want to interrupt me, Mr. Wingrove, but don't.

This is a simple OWI investigation. Nothing more, nothing less. And the officer takes Mr. Mitchell to the hospital as they routinely do on OWI investigations. I don't care if they do Chapter 51.45's at Memorial. It doesn't matter. He takes him there.

They go through the regular procedure. Blood is drawn. And what I think is key is that the phlebotomist then gives the blood back to the officer. That's not part of any treatment program. And the officer does with it what he does. And that's his end with Mr. Mitchell.

At this point if Mr. Mitchell goes from the ER to ICU to 1-K, that's another matter, but that's just a distraction. It's got nothing to do with this case. If the State did try to get information from the hospital regarding Mr. Mitchell after he had been admitted to 1-K, I think there would be a problem. But that's not what's going on. This is just a simple OWI investigation. Nothing more, nothing less.

So for those reasons I'm denying the motion. Anything else?

ATTORNEY WINGROVE: I understand the Court's ruling. I would just direct the Court's attention to DH 92 which says that certain facilities that federal rules become applicable to, and that was -- at that time he was receiving

treatment at the time the blood draw was made. I agree it was separate from, and I understand that.

THE COURT: I think what you're doing, Mr. Wingrove, is just creating a huge distraction. It's a simple OWI investigation. That's it. He's getting no more treatment than any other person who's taken to the hospital for a blood draw when they're drinking and driving. That's it.

All right. Thank you. Do we have a trial date?

ATTORNEY HABERMAN: I'm looking. I don't see that we have a current trial date.

THE COURT: Let's set a trial date for December 17th. December 2nd at four o'clock we had another hearing with Mr. Wingrove. We can put Mr. Mitchell down at that time for motions in limine. Anything else?

ATTORNEY HABERMAN: No. Thank you.

ATTORNEY WINGROVE: Not today.

THE COURT: All right. Thank you.

***** (End of proceedings.) *****

REPORTER'S CERTIFICATE

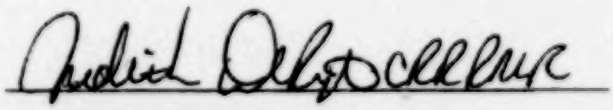
STATE OF WISCONSIN)

) ss

COUNTY OF SHEBOYGAN)

I, Judith M. DeRuyter, Certified Realtime Reporter and Registered Merit Reporter, do hereby **certify by my original signature** that I reported the foregoing matter and that the foregoing transcript has been carefully compared by me with my stenographic notes as taken by me in machine shorthand and by me thereafter transcribed and that it is a true and correct transcript of the proceedings had in said matter to the best of my ability.

Dated this day: September 30, 2014.



Judith M. DeRuyter

Certified Realtime Reporter

Registered Merit Reporter

No. 18-6210

In the Supreme Court of the United States

GERALD P. MITCHELL, PETITIONER,

v.

WISCONSIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, in a State with a civil implied-consent statute, a warrantless blood draw of an unconscious motorist who has been properly arrested for drunk driving is an unreasonable search under the Fourth Amendment.

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INTRODUCTION

Petitioner Gerald P. Mitchell got so drunk that, after driving while under the influence, he passed out and became unconscious. The police then drew his blood for testing blood-alcohol content, under Wisconsin's implied-consent statute, which testing confirmed Petitioner's severe intoxication. Petitioner argued to the Wisconsin Supreme Court that because he got so drunk that he could not withdraw his consent, as he could have done under Wisconsin's implied-consent law had he been conscious, the blood draw violated his Fourth Amendment rights. The Wisconsin Supreme Court rejected this argument, with the Justices comprising the majority urging two different approaches to the unconscious-driver context. Any other conclusion would have given those who drink so much that they become unconscious the windfall of avoiding the lawful civil choice, which other drunk drivers must face, of having their blood drawn or losing their license.

Petitioner urges this Court to review the constitutionality of his blood draw, but offers no persuasive reason for this Court to look into this difficult issue now, just two years after *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). While Petitioner claims that there is a deep division of authority regarding the constitutionality of warrantless blood draws of unconscious drunk drivers, he greatly overstates the legal landscape. In fact, only two state high courts have adopted Petitioner's position that unconscious drivers do not effectively consent to have their blood drawn after an automobile accident by operation of a state implied-consent statute, whereas two state high courts (as well as three of the five Justices of the Wisconsin Supreme Court

who comprised the majority below) have rejected it. In addition, on the broader question of whether blood draws of unconscious, properly arrested drunk drivers are lawful as a reasonable search incident to arrest, without regard to any notion of implied consent, there is no division of authority, given that two of the Wisconsin Supreme Court Justices who comprised the majority below just became among the first jurists to consider this doctrinal solution to the unconscious-driver puzzle. Given the undeveloped nature of the split on the implied-consent issue, and the possibility that the general-reasonableness argument will ultimately render the implied-consent question moot for unconscious drivers, further percolation is warranted.

This Court should deny the Petition.

STATEMENT

A. Legal Background

States protect their highways by drawing on "a broad range of legal tools to enforce their [intoxicated]-driving laws and to secure BAC [blood-alcohol content] evidence without undertaking warrantless nonconsensual blood draws." *Missouri v. McNeely*, 569 U.S. 141, 160–61 (2013) (plurality op.). "For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of [an intoxicated-driving] offense." *Id.* at 161; *see* Wis. Stat. § 343.305.

In Wisconsin, as in other States, "[a]ny person who . . . drives or operates a motor vehicle upon the public highways of this state . . . is deemed to have given

consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath of alcohol [or other] controlled substances . . . when requested to do so by a law enforcement officer" under certain subsections or "when required to do so" under certain others. Wis. Stat. § 343.305(2).

The statute applies differently depending on whether a suspect, having created a presumption of consent under the statute by voluntarily driving on the State's roads, is physically "capable" of withdrawing that consent when the police wish to administer the test. *Id.* § 343.305(3)(b). If the suspect is capable, then the statute affords the suspect an opportunity to do so. The police must advise the conscious suspect of "the nature of the driver's implied consent." *Wisconsin v. Reitter*, 595 N.W.2d 646, 652 (Wis. 1999). Reading from the "Informing the Accused" form, the police usually convey (among other facts) that (1) the suspect has been arrested or detained for an intoxicated-driving offense; (2) the officer "now wants to test one or more samples of [the suspect's] breath, blood or urine to determine the concentration of alcohol or drugs in [the suspect's] system"; (3) if the test shows intoxication, the suspect's "operating privilege will be suspended"; (4) "[i]f [the suspect] refuse[s] to take any test that [the officer] requests, [the suspect's] operating privilege will be revoked and [the suspect] will be subject to other penalties"; (5) "[t]he test results or the fact that [the suspect] refused testing can be used against [the suspect] in court"; and (6) the suspect may take alternative tests if he takes "all the requested tests." Wis. Stat. § 343.305(4). If, instead, the suspect is found "unconscious or otherwise

not capable of withdrawing consent," then the suspect generally "is presumed not to have withdrawn consent," and the relevant subsections state that "one or more samples" may be taken. *Id.* § 343.305(3)(b).

More generally, implied-consent laws impose "consequences when a motorist withdraws consent" and thereby reneges on the commitment under the statute, made in exchange for the privilege of driving. *McNeely*, 569 U.S. at 161 (plurality op.). In some States, before *Birchfield*, those consequences included criminal liability. But this Court in *Birchfield* invalidated those criminal implied-consent penalties, while at the same time "cast[ing] [no] doubt" on "implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." 136 S. Ct. at 2185. Wisconsin's implied-consent law fits into the second, civil-penalty category, since it "attempts to overcome the possibility of refusal" merely "by the threat of . . . license revocation" and evidentiary inferences. *Wisconsin v. Zielke*, 403 N.W.2d 427, 431 (Wis. 1987). Specifically, if a motorist has been arrested for an intoxicated-driving offense and "refuses to take a test," then the officer must prepare a "notice of intent to revoke . . . the person's operating privilege," Wis. Stat. § 343.305(9)(a), the filing of which begins a suspension proceeding in court.

B. Facts And Procedural History

1. One afternoon in 2013, Alvin Swenson called the Sheboygan County police to report that Petitioner had been driving and appeared to be intoxicated. *See* App. 59a, 76a–77a. Officer Alex Jaeger responded to dispatch's request that an officer "check [ ] the welfare of a male subject." App. 59a. When he arrived, Officer

Jaeger spoke to Swenson, who said that he knew Petitioner and "received a telephone call from [Petitioner's] mother concerned about his safety." App. 59a. Swenson observed Petitioner leaving his apartment. App. 77a–78a. Petitioner was "very disoriented," and he "appeared [to be] intoxicated or under the influence, was stumbling, had thrown a bag of garbage into the backyard and had great difficulty maintaining balance, nearly falling several times before getting into a gray minivan and driving away." App. 59a (alterations in original).

About a half hour later, the police found Petitioner. A community-services officer with the Sheboygan County Police Department "had located a male subject matching the physical description" that Officer Jaeger had provided. App. 80a. Officer Jaeger observed Petitioner walking, and his "state was consistent with what Swenson described." App. 59a. He was shirtless, wet, and covered in sand, as if he "had gone swimming in the lake." App. 59a. He "was slurring his words and had great difficulty in maintaining balance, nearly falling over several times," requiring the officers' help to keep upright. App. 59a–60a (internal quotation marks omitted). As they crossed a street, Petitioner "nearly fell after stepping up and over the curb." App. 83a.

Petitioner admitted that "he had been drinking." App. 83a. First, he stated that he had been drinking "in his apartment," but then he said "that he was drinking down at the beach" and had parked his vehicle "because he felt he was too drunk to drive." App. 83a–84a. In the meantime, another officer located the van nearby on Michigan Avenue. App. 85a. That officer relayed to Officer Jaeger "that there was

some minor damage [to the van] that appeared to be fresh." App. 85a. Officer Jaeger learned that Petitioner had "prior convictions" for "operating while intoxicated." App. 84a. Officer Jaeger concluded that Petitioner's condition "made administration of the standard field sobriety tests unsafe, so he declined to administer them." App. 60a. Officer Jaeger administered a preliminary breath test, which showed an alcohol concentration of .24. App. 60a. He arrested Petitioner for operating while intoxicated. App. 60a.

On the way to the police station, Petitioner's condition began "declining," and he became "more lethargic." App. 88a. Petitioner had to be "helped out of the squad car." App. 88a. "[O]nce he was in a holding cell with his handcuffs removed, he began to close his eyes and sort of fall asleep or perhaps pass out. But he would wake up with stimulation." App. 88a. Officer Jaeger concluded that, in light of Petitioner's condition, a breath test would not be appropriate, and so he took Petitioner from the station to the hospital for a blood test. App. 88a–89a. The drive to the hospital took about eight minutes. App. 89a. During the drive, Petitioner "appeared to be completely incapacitated, would not wake up with any type of stimulation," including "shak[ing] his arm, lift[ing] up his hands, shak[ing] his hands, [and] rub[bing] the top of his head." App. 89a. Petitioner "had to be escorted into the hospital by wheelchair," where he sat "slumped over" unable to "lift himself up" into a normal sitting position. App. 89a–90a. Soon thereafter, Officer Jaeger read the "Informing the Accused form verbatim" to Petitioner, but Petitioner was "so incapacitated [that] he could not

answer." App. 90a. Petitioner was eventually admitted to the hospital for treatment and monitoring. App. 94a–95a, 99a, 107a.

Officer Jaeger recalled that, as he waited for the phlebotomist to draw blood, "medical efforts were being attempted," App. 94a, and Petitioner was being "monitored" by hospital staff, App. 99a. The unconscious Petitioner, however, "couldn't answer any hospital staff . . . and did not awake[n] while they placed catheters or any other type of medical instruments on him." App. 94a–95a; App. 100a (recalling "specifically" that one nurse had inserted a catheter). The test was administered about one hour after arrest and revealed a blood-alcohol concentration of .222. App. 6a, 92a. Petitioner was eventually admitted to the hospital's intensive-care unit. App. 109a. Officer Jaeger stated on cross-examination that he could have applied for a warrant but that he did not. He did not know how long it would have taken to secure a warrant. He explained that his office had only recently started seeking warrants in cases like this one. App. 109a.

2. The State charged Petitioner with driving while under the influence (his seventh such offense) and with a prohibited alcohol concentration. App. 59a & n.1. He moved to suppress the warrantless blood test, arguing that the test violated the Fourth Amendment. The circuit court denied Petitioner's motion. App. 6a. The State tried Petitioner before a jury, which convicted him. App. 7a. He was sentenced to three years' initial confinement and three years' extended supervision on each count. App. 61a.

Petitioner appealed, App. 61a, and the Wisconsin Court of Appeals certified the appeal to the Wisconsin Supreme Court, App. 58a. The Wisconsin Supreme Court accepted certification and affirmed, holding in a splintered decision that the blood draw in this case was constitutional. App. 3a–4a, 34a.

Chief Justice Roggensack, joined by two other Justices, concluded that Petitioner had "voluntarily consented to a blood draw by his conduct of driving on Wisconsin's roads and drinking to a point evidencing probable cause of intoxication." App. 4a. "[T]hrough drinking to the point of unconsciousness," Chief Justice Roggensack explained, Petitioner forfeited his statutory opportunity under Wis. Stat. § 343.305(4) to withdraw his consent. App. 4a. Citing this Court's decisions in *Birchfield*, 136 S. Ct. 2160, *Florida v. Jardines*, 569 U.S. 1 (2013), and *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), App. 10a–11a, Chief Justice Roggensack explained that "in the context of significant, well-publicized laws designed to curb drunken driving, [drivers on Wisconsin roads] consent to an evidentiary drawing of blood upon a showing of probable cause to believe that they operated vehicles while intoxicated," App. 14a. This regime is reasonable, and thus constitutional, as applied to drunk drivers, like Petitioner, who drink so much that they pass out and cannot, as a practical matter, withdraw their consent at the moment of the blood draw. App. 29a.

In turn, Justice Kelly, joined by Justice R.G. Bradley, concluded that the blood draw was lawful, but under another rationale. App. 34a, 45a. Although Justice Kelly disagreed with the view that the blood draw was a consent search, the search was

constitutional, in Justice Kelly's view, "because performing a blood draw on an unconscious individual who has been arrested for operating a motor vehicle while intoxicated . . . is reasonable within the meaning of the Fourth Amendment." App. 34a. The "warrantless blood test was reasonable" here because Petitioner "had been arrested for OWI, evidence of the offense was continually dissipating, there was no telling how long he would be unconscious, his privacy interest in the evidence of intoxication within his body had been eviscerated by the arrest, and no less intrusive means were available to obtain the evanescent evidence." App. 41a. Justice Kelly also pointed out that in the unconscious-driver context, the breath-test option critical to this Court's decision in *Birchfield* is unavailable. App. 41a.

Justice A.W. Bradley, joined by Justice Abrahamson, dissented, arguing that "[c]onsent provided solely by way of an implied consent statute is constitutionally untenable." App. 46a–47a, 56a. Finding no other basis in Fourth Amendment law to support the search, the dissent concluded that the blood-alcohol evidence should be suppressed. App. 47a, 56a.

REASONS FOR DENYING THE PETITION

I. There Is Only A Narrow Division Of Authority On The Implied-Consent, Unconscious-Driver Issue And Further Percolation Is Warranted

In *McNeely*, this Court held that the fact of dissipation of blood-alcohol evidence did not, standing alone, create a *per se* rule permitting police to draw the suspect's blood under the exigent-circumstances doctrine: "while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case

. . . it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." 569 U.S. at 156. A plurality of Justices further explained that "States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws." *Id.* at 160–61.

Two years ago in *Birchfield*, this Court held that States could require drunk-driving suspects to undergo breath tests—but not blood tests—as a search incident to arrest. 136 S. Ct. at 2184. In explaining this holding, this Court reasoned that blood tests are more intrusive than breath tests and the reasonableness of blood tests "must be judged in light of the availability of the less invasive alternative of a breath test." *Id.*

Then, turning to the consent inquiry, *Birchfield* held that States could not subject suspects who refuse to consent to blood draws to criminal sanctions notwithstanding the existence of an implied-consent law. In explaining its reasoning, *Birchfield* noted that "sometimes consent to a search need not be express but may be fairly inferred from context," and pointed out that this Court's "prior opinions [including *McNeely*] have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Id.* at 2185. Nevertheless, criminal penalties were beyond the scope of reasonableness even in the implied-consent context. *Id.* at 2186.

The present case involves a question that this Court has never confronted: whether, in a State with a civil implied-consent statute, a warrantless blood draw of an unconscious motorist who has been properly arrested for drunk driving is an unreasonable search under the Fourth Amendment. Petitioner cites a series of state-court decisions that he reads to reject the reasoning relied upon by Chief Justice Roggensack and two other Justices below that such a blood draw is permissible under consent-to-search principles. Pet. 8–13. According to Petitioner, these cases endorse his argument that implied-consent statutes, like the one at issue here, cannot justify warrantless blood draws in the unconscious-driver context because those drivers cannot, as a practical matter, revoke their consent at the time of the blood draw. Pet. 8–13. But Petitioner greatly overstates the legal landscape. In fact, only two state courts of last resort have endorsed his view of implied consent, while two have rejected it and adopted the approach articulated by Chief Justice Roggensack. This shallow division of authority should be permitted to further percolate, both because this Court's decision in *Birchfield* is so recent and because Justices Kelly and R.G. Bradley below proposed a non-consent-based solution to the unconscious-driver puzzle, which could well render the implied-consent issue moot.

A. There is only a narrow split of authority on whether an implied-consent statute justifies a probable-cause-based blood draw of an unconscious suspect.

1. Two courts of last resort have held, consistent with Chief Justice Roggensack's decision below, that warrantless blood draws of unconscious drunk drivers in implied-consent States are valid consent searches. Most recently, the

Colorado Supreme Court reached this conclusion in *Colorado v. Hyde*, 393 P.3d 962 (Colo. 2017), explaining that "[b]y choosing to drive in the state of Colorado, Hyde gave his statutory consent to chemical testing in the event that law enforcement officers found him unconscious and had probable cause to believe he was guilty of DUI." *Id.* at 967–68. Justice Eid, in a concurring opinion, expanded upon this reasoning, explaining that "*Birchfield* holds that traditional implied consent statutes such as Colorado's—which deem drivers to have consented to BAC testing as a condition of driving upon the state's roads and impose administrative and evidentiary consequences upon refusal to test—meet the dictates of the Fourth Amendment." *Id.* at 970. Hence in the case at bar, "the defendant is deemed by statute to have consented to BAC testing by virtue of driving on the roads, making irrelevant his inability to consent (due to his unconscious state) at the scene." *Id.* The Minnesota Supreme Court took a similar position on the implied-consent issue, in the unconscious-driver context, almost 40 years ago. *See Minn. Dep't of Pub. Safety v. Wiehle*, 287 N.W.2d 416, 419 (Minn. 1979).

Petitioner also cites *Cripps v. Oklahoma*, 387 P.3d 906, 909 (Okla. Crim. App. 2016), Pet. 15, but that case merely held that a statute creating *a per se* rule that drivers involved in a fatal or serious-bodily-injury accident must submit to a blood-alcohol test "as soon as practicable" did not violate *McNeely*. *Cripps*, 387 P.3d at 909. *Cripps* thus did not address whether implied-consent laws provide constitutionally sound authority for police to administer a blood test to an unconscious drunk-driving suspect as a general matter.

2. Contrary to Petitioner's claims, only two state courts of last resort have adopted Petitioner's view that an implied-consent statute does not authorize an unconscious blood draw from a drunk-driving suspect because that suspect has no practical opportunity to withdraw consent at the moment of the draw. *See Arizona v. Havatone*, 389 P.3d 1251 (Ariz. 2017); *North Carolina v. Romano*, 800 S.E.2d 644 (N.C. 2017). In *Havatone*, the Arizona Supreme Court, accepting a concession by the State, held that a blood draw can be taken from an unconscious driver only "if case-specific exigent circumstances exist," even in the face of an implied-consent regime. 389 P.3d at 1254. In *Romano*, the North Carolina Supreme Court reached the same result, agreeing with the Arizona Supreme Court in *Havatone* and disagreeing with the Colorado Supreme Court in *Hyde*. *See Romano*, 800 S.E.2d at 648 & n.2. And while Petitioner claims that the Pennsylvania Supreme Court adopted the same position in *Pennsylvania v. Myers*, 118 A.3d 1122 (Pa. 2015), Pet. 11, that decision turned on the fact that the officers failed to comply with the State's implied-consent law by not timely giving the defendant the chance to withdraw his consent, under a state law that gives drivers an absolute right to withdraw consent and has no exception for unconscious drivers, 118 A.3d at 1129–30.

Petitioner also points to cases from "other contexts," Pet. 12–13, but these cases do not involve unconscious drivers and thus do not purport to deal with consent issues that arise in that special context. In *South Dakota v. Fierro*, 853 N.W.2d 235 (S.D. 2014), the court held merely that when a suspect "verbally and physically refused to provide a sample," her "actions taken in their totality can hardly be taken as 'consent'

by constitutional standards." *Id.* at 242. The same is true of Petitioner's Delaware and Nebraska cases, since they hold only that, in conscious-driver cases, courts should look to the totality of the circumstances to assess whether the motorist is presently consenting. *See Flonnory v. Delaware*, 109 A.3d 1060, 1065–66 (Del. 2015); *Nebraska v. Modlin*, 867 N.W.2d 609, 613 (Neb. 2015). And *Byars v. Nevada*, 336 P.3d 939 (Nev. 2014), held unconstitutional a provision of Nevada's implied-consent statute enabling an officer to use force to obtain a blood sample. *Id.* at 942, 946; *see also Iowa v. Pettijohn*, 899 N.W.2d 1, 36 (Iowa 2017) (faulting Iowa's implied-consent statute for the state-specific reason that its advisory "failed to mention the serious criminal consequences [of boating while intoxicated]").

Petitioner also cites a handful of lower-court decisions that have adopted his position, Pet. 9–11, 13, but none of those cases support his claim of a division of authority warranting this Court's review. Indeed, a couple of them are currently pending further review by the State's court of last resort. *See, e.g., California v. Arredondo*, 199 Cal. Rptr. 3d 563 (Cal. Ct. App. 2016), *review granted and opinion superseded by* 371 P.3d 240 (Cal. 2016); *Texas v. Ruiz*, 545 S.W.3d 687 (Tex. App. 2018), *review granted* (Apr. 25, 2018). There are, of course, lower-court decisions pointing the other way, and one of those cases is also pending further review by a higher state court. *See McGraw v. Florida*, 245 So. 3d 760 (Fla. Dist. Ct. App. 2018), *review granted*, No. SC18-792, 2018 WL 3342880 (Fla. July 9, 2018); *see also Bobeck v. Idaho Transp. Dep't*, 363 P.3d 861 (Idaho Ct. App. 2015).

B. Further percolation is warranted for two reasons.

First, the split on the implied-consent issue, as it relates to unconscious drivers, is exceedingly narrow, and this Court would benefit from permitting lower courts to consider this question, especially in light of *Birchfield*. The split is only 2-2 among state courts of last resort, with no federal court of appeals weighing in. In addition, one of the two cases on Respondent's side—*Wiehle*, from the Minnesota Supreme Court—was decided almost 40 years ago, while one of the two cases on Petitioner's side—*Havatone*, from the Arizona Supreme Court—appears to have been decided without adversarial briefing on this key issue, after a concession by the State. *See supra* p. 13. The rest of the decisions addressing the implied-consent, unconscious-driver issue come from lower courts, and several of them have been vacated and/or further proceedings are ongoing before those States' courts of last resort. *See supra* p. 14. Given that this Court spoke in the implied-consent area in *Birchfield* just two years ago, and in light of the paucity of caselaw from courts of last resort on the difficult unconscious-driver issue since, this is the paradigmatic case for the virtues of further percolation. *See McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting the denial of petitions for writs of certiorari) ("[I]t is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.").

Second, Justice Kelly, joined by Justice R.G. Bradley, has now offered an entirely different rationale for upholding the constitutionality of unconscious, drunk-driver blood draws, a rationale that does not turn on notions of implied consent and

may well render the narrow split on the consent issue moot. As explained by Justice Kelly and in more detail below, *see infra* pp. 18–20, there is a strong argument that the implied-consent regime is unnecessary in the unconscious-driver context because such blood draws are reasonable as a search incident to arrest. This powerful rationale has not yet been explored by lower courts, because, so far as Respondent has been able to determine, Justice Kelly's opinion appears to be the first articulation of this rationale in a published decision. As this argument becomes more prominent in lower courts, it may well swallow as irrelevant the shallow split on the implied-consent issue discussed above. At the very minimum, further percolation is warranted to permit lower courts to explore the import of this argument for this difficult, evolving area of Fourth Amendment law.

II. The Wisconsin Supreme Court Correctly Decided That The Blood Draw Was Lawful

The search here was reasonable for two independently sufficient reasons, each given by Justices of the Wisconsin Supreme Court below: (A) the search satisfied the consent exception to the warrant rule, and (B) the search was generally reasonable as a search incident to arrest and therefore constitutional, even if one puts to the side any notions of implied consent.

A. As Chief Justice Roggensack, joined by two other Justices, correctly concluded below, the blood-draw search here was lawful because the officers had probable cause to believe that Petitioner had driven while intoxicated, the testing was consistent with a reasonable, civil, implied-consent statute, and the only reason

Petitioner did not have the opportunity to withdraw his consent was his voluntary choice to drink so much that he rendered himself unconscious.

This Court's search-and-seizure doctrine provides that a defendant may imply consent to a search by conduct. *See generally Jardines*, 569 U.S. 1. As relevant here, because the courts properly presume that drivers know the law that governs their conduct, *see Barlow v. United States*, 32 U.S. 404, 411 (1833), it may "be fairly inferred from context" that voluntary conduct undertaken against the backdrop of a legal rule is best understood as according with that rule, *Birchfield*, 136 S. Ct. at 2185. Thus, "in the context of significant, well-publicized laws designed to curb drunken driving, [drivers] consent to an evidentiary drawing of blood upon a showing of probable cause to believe that they operated vehicles while intoxicated." App. 14a. And while there is "a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads" under a statute, as this Court made clear in *Birchfield*, the law challenged here is within the Fourth Amendment's permissible bounds. 136 S. Ct. at 2185–86. The statute's search conditions bear a close nexus to the privilege of driving, entail civil penalties that are proportional to the violation in question, and are otherwise reasonable in scope as applied to drivers whose own misconduct rendered them unable, as a practical matter, to withdraw their consent. App. 22a–29a.

As applied to this case, Petitioner voluntarily drove on Wisconsin's highways in the face of a "well-publicized" implied-consent statute. App 14a. Law enforcement surely had probable cause to arrest him for driving under the influence: "His speech

was slurred; he smelled of alcohol; he had difficulty maintaining his balance." App. 29a. And the only reason that he was not able to withdraw his consent was his own wrongdoing, as he voluntarily "chose to drink sufficient alcohol to produce unconsciousness." App. 29a. While Petitioner objects to this line of reasoning because, in his view, an unconscious driver does not have a "free and unconstrained" choice whether to consent, Pet. 16–18 (citation omitted), it was Petitioner's own choice that placed him into the conditions where he was not able to withdraw his consent, App. 29a, a consent that he voluntarily gave by operating a vehicle on Wisconsin roads. Nothing in the Fourth Amendment requires those in Petitioner's position to receive the windfall of avoiding the civil choice in implied-consent statutes—have a blood draw or lose your license—because they drank so much that they passed out.

B. The search here was also constitutional under the search-incident-to-arrest approach articulated by Justice Kelly below: drawing blood from Petitioner—a properly arrested, unconscious, drunk driver—was reasonable incident to the lawful arrest, without regard to any notions of implied consent.

The "ultimate measure of the constitutionality of a governmental search" is not the presence of a warrant but simply "reasonableness." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995). Courts "generally determine whether to exempt a given type of search from the warrant requirement" by weighing, on the one hand, the "degree to which [the type of search] is needed for the promotion of legitimate governmental interests," and, on the other, "the degree to which it intrudes upon an individual's privacy." *Riley v. California*, 134 S. Ct. 2473, 2484 (2014) (citation

omitted). Thus, in *Birchfield*, this Court held that subjecting a drunk driver to a breath test was lawful as a search incident to arrest, but subjecting that suspect to a blood test was not lawful, especially because a breath test was less intrusive and the lawfulness of the blood test "must be judged in light of the availability of the less invasive alternative of a breath test." 136 S. Ct. at 2184.

Applying these principles here, warrantless blood draws are reasonable in the special context of unconscious drunk drivers, as lawful searches incident to arrest. A vital government interest justifies searches in this special context because an unconscious driver is the worst of the worst in this already serious area. Further, the intrusiveness of blood draws for drivers who have been arrested for intoxicated driving, who can typically expect to receive medical attention, and who will not be awake during the draw is less significant than in the conscious blood-draw context that this Court discussed in *Birchfield*, where the suspect is awake and the suspect's cooperation is required. 136 S. Ct. at 2184. More broadly, as Justice Kelly explained, the blood test was constitutional because Petitioner, and those similarly situated, had "been arrested for OWI, evidence of the offense was continually dissipating, there was no telling how long he would be unconscious, his privacy interest in the evidence of intoxication within his body had been eviscerated by the arrest, and no less intrusive means were available to obtain the evanescent evidence." App. 41a.

The last point that Justice Kelly emphasized is particularly critical: the breath-test option was key to this Court's decision in *Birchfield* rejecting the reasonableness of a blood test incident to arrest. *See* 136 S. Ct. at 2184. But that option is not

available in the unconscious-driver context, due to the driver's own egregious misconduct of driving after drinking so much that he eventually passes out. App. 41a–42a. While *Birchfield* in dicta speculated that police could seek a warrant for a "person who is unconscious (perhaps as a result of a crash)," adding that "we have no reason to believe that such situations are common in drunk-driving arrests," 136 S. Ct. at 2184–85, in fact, numerous States have enacted special statutes to deal with these rather common situations, *see* Pet. 3 n.1. And, as *Birchfield* itself explained, warrants serve only a limited purpose in this context because "[a] magistrate would be in a poor position to challenge [the officer's probable-cause] characterizations," and "[i]n every case the scope of the warrant would simply be a BAC test of the arrestee." 136 S. Ct. at 2181. Accordingly, in the limited situation of an unconscious driver, probable-cause-based blood draws are reasonable, as a lawful searches incident to arrest, without any need to seek a warrant or inquire into implied consent.

CONCLUSION

This Court should deny the Petition.

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No. 18-6210

IN THE

Supreme Court of the United States

GERALD P. MITCHELL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court of Wisconsin

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The brief in opposition presents no credible basis for denying review. On the essential question—whether a legislature can, by way of an informed-consent statute, "deem" a class of persons to have consented to a search—the lower courts are clearly divided. Respondent tries to wave this split away, insisting that only cases involving the precise facts here—an unconscious motorist—matter. But the condition of the individual motorist doesn't alter the basic question: can a statutory declaration of "consent" defeat the warrant requirement this Court revived in *Missouri v. McNeely*, 569 U.S. 141 (2013)?

Respondent also offers that the question may be "mooted" once the nation gets wind of the theory advanced by the two-justice concurrence in this case. But, depending which of Respondent's filings one reads, this new theory is either that a blood draw from an unconscious motorist is a valid search incident to arrest—a proposition this Court already rejected in *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2184-85 (2016)—or that there is a heretofore unknown "general-reasonableness" exception to the warrant requirement. As Respondent makes no argument that the question presented is not important, and offers no reason why this case is not the right vehicle to answer it, this Court should grant certiorari.

I. State appellate courts are deeply divided on whether implied-consent laws create an exception to the warrant requirement

1. As the Petition noted, appellate courts of at least 20 states have decided whether implied-consent laws do away with the need for a warrant for a blood draw. Most have held they do not, but about one-third have gone the other way. Pet. 8-16 Respondent doesn't ever quite dispute this. Instead, it points to other, tangential features of some of these cases, while ignoring the courts' clear pronouncements on the main question.

So, for example, Respondent says the Supreme Court of Pennsylvania's decision doesn't count because it involved, among other things, officers' failure to comply with statutory requirements. Opp. 13. But what did the court itself say? It aligned itself with the "clear and unmistakable trend toward the recognition that statutorily implied consent alone does not satisfy the consent exception to the warrant requirement." *Commonwealth v. Myers*, 164 A.3d 1162, 1172 (Pa. 2017).

Or, take Respondent's dismissal of the high court decisions in Delaware and Nebraska. It says they hold only that "courts should look to the totality of the circumstances to assess whether the motorist is presently consenting." Opp. 14. That *is* what those courts held—which is why they *also* held that their states' implied-consent laws, despite purporting to authorize blood draws, could not constitutionally do so. *Flonnory v. Delaware*, 109 A.3d 1060, 1065 (Del. 2015) ("[T]he trial court erred when it concluded that 'Defendant's statutory implied consent exempted the blood draw from the warrant requirement.'"); *State v.*

Modlin, 867 N.W.2d 609, 619 (Neb. 2015) ("[A] court may not rely solely on the existence of an implied consent statute to conclude that consent to a blood test was given for Fourth Amendment purposes.").

Petitioner won't rehash each case discussed in the petition, but stands by what he has said (and what Respondent, again, doesn't really dispute): they all address whether an implied-consent law can supply actual, constitutional consent. Most say it can't, some say it can. Pet. 8-13.

2. Respondent also observes that no federal appellate court has decided the issue presented here. Opp. 15. There's a simple reason for this: there are few federal drunk-driving prosecutions, and the federal implied-consent statute doesn't permit testing absent actual consent. 18 U.S.C. § 3118 (b). And there's also virtually no *habeas corpus* review of Fourth Amendment claims. *Stone v. Powell*, 428 U.S. 465, 495 (1976).

So even a deep split on an important Fourth Amendment question related to drunk driving isn't going to be reflected in the federal courts. This is certainly why this Court's search-and-seizure cases involving drunk driving have all come, like this one, from the state courts. *See, e.g., Birchfield*, 136 S. Ct. 2160 (and its two companion cases); *Navarette v. California*, 572 U.S. 393 (2014); *McNeely*, 561 U.S. 141; *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990); *Welsh v. Wisconsin*, 466 U.S. 740 (1984); *Schmerber v. California*, 384 U.S. 757 (1966). If this issue is going to be resolved, it's going to be resolved in this Court.

3. Respondent notes that some of the decisions Petitioner cites come from intermediate appellate courts. Opp. 14-15. This is true (though, as Respondent also observes, opp. 14, two of those are already pending in courts of last resort).

But what of it? Even limiting the field to the court-of-last-resort decisions, the doctrinal lines are drawn. The dispute is not complicated; it's well understood. Most courts (and some judges on divided courts) hold that consent must come from the individual, not the legislature, and must be voluntary under the totality of the circumstances, rather than a *per se* legislative declaration. *See, e.g.*, *State v. Havatone*, 389 P.3d 1251, 1255 (Ariz. 2017); *State v. Romano*, 800 S.E.2d 644, 652 (N.C. 2017); *State v. Mitchell*, 914 N.W.2d 120, 167 (Kelly, J. concurring) & 172 (Bradley, J. dissenting). Respondent doesn't explain what's wrong with this position, or even discuss it at all.

The few courts and judges to conclude otherwise have generally said that *Birchfield*'s commendation of civil penalties for refusing a blood draw also (silently) announced a warrant exception for laws permitting blood draws without consent. *See, e.g.*, *People v. Hyde*, 393 P.3d 962, 968 (Colo. 2017); *Mitchell*, 914 N.W.2d at 211-213. Respondent also declines to defend this analysis; instead, it assures the Court that it may someday "percolate" into something more substantial. But no amount of percolating will strengthen this weak tea.

4. Respondent further urges the Court to leave the question unresolved because *Birchfield* is only two years old. But to the extent *Birchfield* blessed implied-consent laws, it was only to say that they

could impose civil, but not criminal, penalties for refusal.

The question in this case is different and, in some ways, logically prior: can implied-consent laws do away with the option of refusal altogether? As Petitioner has argued, this seems to contradict *Birchfield*'s rationale: how can it violate the Fourth Amendment to criminalize a motorist's insistence on a warrant if the Fourth Amendment doesn't require a warrant at all? The fact that some courts have adopted this strained reading of *Birchfield* is not a reason for the Court to bypass the question here.

5. Respondent's main argument is that not enough lower courts have considered the constitutional question as applied to the precise circumstances here: an unconscious driver. Opp. 13-14. Respondent asserts that an unconscious driver is a "special context" giving rise to its own category of "consent issues." Opp. 13. But what are these issues? Respondent doesn't say. If the act of driving constitutes voluntary, Fourth Amendment consent to a blood draw (because of the assertedly "well-publicized" nature of the implied-consent statute), then why should the condition of the motorist at the time of the draw itself change anything?

If Respondent is really arguing that what the statute supplies is *consent*, then the only conduct necessary to manifest this supposed consent—driving—is complete some time before the blood draw. If Petitioner consented, then so did the drivers in all those cases Respondent dismisses. The question is the same. And those courts that have decided that a statute *can't* supply constitutional consent are necessarily wrong.

The difference between a conscious person and an unconscious one *might* matter, though, if we're not really talking about consent. And Respondent is mostly not talking about consent. Though it recites the argument of the plurality in this case, its main focus is on the position taken by the two concurring justices, which is not founded in consent at all. But, as Petitioner will argue below, this novel theory (despite the hopes Respondent places on it) is plainly wrong, and will not "solve" the problem of implied-consent statutes.

II. Respondent's defense of the decision below is meritless

1. Respondent only halfheartedly defends the theory advanced by the plurality below—that an implied-consent statute legislates into existence "voluntary consent" in a Fourth Amendment sense. It leaps from the maxim that "ignorance of the law is not a defense" to the conclusion that if a legislature declares certain conduct to manifest "consent," the Fourth Amendment is satisfied regardless of any other circumstances. Opp. 17-18. Petitioner, along with many courts, has already explained the flaws in this reasoning. He will add here only that it would permit state legislatures to do away with the warrant requirement in any number of contexts—simply by declaring that, for example, a homeowner consents to a search of the home by accepting the provision of public utilities, or that a pedestrian consents to a search of the person by use of the public sidewalk.

2. Respondent next claims that the concurrence in this case offers a solution to the

problem—that the "powerful rationale" that it (and it alone) advances will "become more prominent" and thereby "swallow as irrelevant" the implied-consent question that has so divided the lower courts. Opp. 16.

And what is this powerful rationale? The nub of the argument draws on *Schmerber*, *McNeely*, and *Birchfield*, and seems to be a sort of mashup of the doctrines of exigent circumstances and search incident to arrest. *Mitchell*, 914 N.W.2d at 170 (Kelly, J., concurring). But Respondent makes no claim of exigency here, choosing instead to place the theory under the heading of search incident to arrest. Opp. 16-20.

There's a problem, though: *Birchfield* has already excluded blood draws from searches incident to arrest, saying that faced with an unconscious driver "the police may apply for a warrant if need be." 136 S. Ct. at 2184-85. The concurrence's approach to this difficulty, as Petitioner has noted, was to declare that the *Birchfield* opinion is "self-contradictory" and thus can't have meant what it said. Pet. 7; *Mitchell*, 914 N.W.2d at 171 n.2.

Respondent takes a different approach to the *Birchfield* problem: hedging its bets. In fact, in other litigation, it has freely admitted that *Birchfield* disallows blood draws from unconscious motorists as searches incident to arrest, saying the concurrence "could not have tethered [its] analysis solely to the search incident to arrest doctrine without running afoul of *Birchfield*." Replacement Supplemental Brief for Respondent at 5, *State v. Hawley*, No. 2015AP1113, 2018 WL 4408869 (Wis. Ct. Apps. Nov. 21, 2018).

In that case, Respondent explicitly took the position that it hints at here: that blood draws from unconscious motorists fall not within the search-incident exception, but within what it calls the "general-reasonableness" exception. *Id.* at 2-5; Opp. 2, 18-19. This may be an accurate characterization of the concurrence's theory, because it does try to skirt *Birchfield*'s holding on searches incident to arrest by importing notions of exigency from *McNeely* (and even *Schmerber*). The problem with the mix-and-match "general-reasonableness" theory is that there's no such thing, as the court of appeals noted in *Hawley*:

> the State does not support the implicit assertion that there is such a thing as "a general reasonableness exception to the warrant requirement." It appears to us that cases that have surveyed exceptions to the warrant requirement, such as *McNeely*, teach that there is a limited list of recognized exceptions, with no mention of an amorphous general reasonableness exception. *See McNeely*, 569 U.S. at 148-50.

Hawley, No. 2015AP1113, slip op. at 8 (Wis. Ct. Apps. Nov. 21, 2018).

The court of appeals is right: "Our cases have held that a warrantless search of the person is reasonable only if it falls within a recognized exception." *Missouri v. McNeely*, 569 U.S. at 148. So the theory of the concurrence fails. Blood draws like the one here can't be valid searches incident to arrest after *Birchfield*; still less can they survive as a species of the fictional "general-reasonableness" exception. The concurrence's theory is a nonstarter, and it will not save the day.

III. The question presented is important, and this case presents an ideal vehicle for deciding it

Respondent doesn't raise any argument that this case isn't a good vehicle to decide the question presented. In fact it volunteers that there was, factually, no exigency that could otherwise have justified the search, noting that the officer here could have applied for a warrant but didn't because it wasn't department policy. Opp. 7.

Nor does Respondent argue that the question presented is not important—it says, actually, that arrests of unconscious drunk-driving suspects are "rather common" and notes, with Petitioner, that many states have statutes specifically authorizing blood draws in this circumstance. Opp. at 20. It even allows that the question presented is a "difficult" one, in arguing that it ought to be allowed to further "percolate." Opp. 1, 15, 16.

But in truth, whether a state legislature can enact a blanket declaration of Fourth Amendment "consent" to a blood draw is a straightforward question. And, because *McNeely* and *Birchfield* have limited the exigency and search-incident rationales, it's an increasingly urgent one. As this case presents the question cleanly, it is worthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 18-6210

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Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

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SUPREME COURT OF WISCONSIN

2015AP304-CR

State of Wisconsin

v.

Gerald P. Mitchell

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
2/10/2015	Notice of Appeal filed in Cir. Ct.
2/13/2015	Notice of Appeal & Court Record
5/13/2015	Brief of Appellant Filed By: Linda Schaefer
8/14/2015	Brief of Respondent Filed By: Michael Sanders
10/2/2015	Reply Brief Filed By: Linda Schaefer

5/17/2017	Opinion/Decision Judge Panel: Hagedorn, Neubauer, Reilly Opinion: Certification Decision: Certification Filed Pages: 14 Order Text: This case raises a single question: whether the warrantless blood draw of an unconscious motorist pursuant to Wisconsin's implied consent law, where no exigent circumstances exist or have been argued, violates the Fourth Amendment.

5/17/2017	Certification Filed Filed By: Unassigned District 2 Submit Date: 5-22-2017 Decision: (G) Grant Decision Date: 9-11-2017 ORD the certification is granted and the appeal is accepted for consideration of all issues raised before the court of appeals. When this court grants direct review upon certification, it acquires jurisdiction of the case, Wis. Const. art. VII, 3(3), that is, the entire appeal, which includes all issues, not merely the issues certified or the issue for which the court accepts the certification. Stat v. Stoehr, 134 Wis. 2d 66, 70, 396 N.W.2d 177 (1986); Wis. Stat. 808.05(2) and (Rule)809.61. Further, the court has jurisdiction over issues not certified because the court may review an issue directly on its own motion. Wis. Stat. 808.05(3); and FRO that within 30 days after the date of this order the appellant must file either a brief in this court or a statement that no brief will be filed; that within 20 days of filing, the respondent must file either a brief or a statement that no brief will be filed; and that if a brief is filed by the respondent, within 10 days of filing, the appellant must file either a reply brief or a statement that no reply brief will be filed; and FRO that in any brief filed in this

	court the parties shall not incorporate by reference any portion of their court of appeals' brief; instead, any material upon which there is reliance should be restated in the brief filed in this court; and FRO that in the event any party elects not to file a brief in this court, the briefs previously submitted by that party to the court of appeals shall stand as that party's brief in the Supreme Court; and FRO that within the time period established for the filing of the briefs, each party must provide the clerk of this court with copies of the briefs previously filed on behalf of that party in the court of appeals. If a party elects to file a new brief(s), 10 copies of their court of appeals brief(s) must be provided. If a party elect
10/25/2017	First Brief-Supreme Court Filed By: Linda Schaefer Comment: Please note the party designation on the caption was corrected on the covers of all briefs. Please use the above caption on all future briefs. Appendix to First Brief-Supreme Court
11/21/2017	Response Brief-Supreme Court Filed By: Ryan Walsh Comment: Separate Appendix

12/15/2017	Reply Brief-Supreme Court Filed By: Linda Schaefer Comment: Please note that the form and length certification pursuant to Rule 809.19(8)(d) has been corrected in this brief.
12/15/2017	Brief of Amicus Curiae-MADD Filed By: (St. John, Kevin) Comment: Mothers Against Drunk Driving
7/3/2018	Opinion/Decision Judge Panel: Roggensack, Abrahamson, Bradley, Ziegler, Gableman, Bradley, Kelly Opinion: Opinion Decision: Affirmed Pages: 30 Written by: Roggensack, Patience Drake Abrahamson, Shirley S. Joined Dissenting Opinion Bradley, Ann Walsh Wrote Dissenting Opinion 11 pages. Bradley, Rebecca Grassl Joined Concurring Opinion Kelly, Daniel Wrote Concurring Opinion 12 pages. Order Text: The judgment of the circuit court is affirmed.

CIRCUIT COURT, SHEBOYGAN COUNTY, WISCONSIN

13 CF 365

State of Wisconsin

v.

Gerald P. Mitchell

RELEVANT DOCKET ENTRIES

Date Filed	Docket No.	Docket Text
6/28/2013	1	Criminal Complaint
		* * *
7/17/2013	11	Criminal Minutes - Preliminary 7-17-13
7/17/2013	12	Exh 1 Lab Report
7/17/2013	13	Certified Record - DMV
7/17/2013	14	Information
		* * *
9/4/2013	23	Defendant's Motion to Suppress Evidence Warrantless Bodily Intrusion
		* * *
10/14/2013	30	ADA Haberman Submits State's Brief
10/14/2013	31	State's Brief on the Implied Consent Law and McNeely
		* * *
10/16/2013	33	Criminal Minutes - Motion Hearing 10-16-13
10/16/2013	34	Exh 1 Informing the Accused
10/16/2013	35	Exh 2 Alcoholic Influence Report
10/16/2013	36	Exh 3 Blood/Urine Analysis

	* * *	
12/17/2013	44	Criminal Minutes - Jury Trial 12-17-13
	* * *	
12/17/2013	48-2	Exh 2 Statement of Alvin Swenson
12/17/2013	48-3	Exh 3 Stipulation on Lab Results
	* * *	
12/17/2013	48-7	Exh 7 Informing the Accused Form
12/17/2013	48-8	Exh 8 Lab Report
	* * *	
12/17/2013	52	Verdict - Guilty OWI
12/17/2013	53	Verdict - Guilty Oper w/PAC
	* * *	
3/3/2014	65	Judgment of Conviction
	* * *	
2/10/2015	77	Notice of Appeal
	* * *	
9/24/2013	81	Transcript, Preliminary Hearing/Arraignment 7-17-13
	* * *	
10/1/2014	86	Transcript, Motion Hearing 10-16-13
	* * *	
10/1/2014	89	Transcript, Jury Trial 12-17-2013

SUPREME COURT OF WISCONSIN

2015AP304-CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Gerald P. Mitchell,

Defendant-Appellant.

ON CERTIFICATION FROM THE COURT OF APPEALS

OPINION FILED: July 3, 2018

SUBMITTED ON BRIEFS:

ORAL ARGUMENT: April 11, 2018

SOURCE OF APPEAL:

Sheboygan Circuit, Terence T. Bourke

JUSTICES:

Concurred: KELLY, J., concurs, joined by R.G. RADLEY, J. (opinion filed).

Dissented: A.W. BRADLEY, J., dissents, joined by ABRAHAMSON, J. (opinion filed).

ATTORNEYS:

For the defendant-appellant, there were briefs filed by *Linda J. Schaefer* and *Schaefer Law Firm, S.C.*, Sturgeon Bay. There was an oral argument by *Linda J. Schaefer*.

For the plaintiff-respondent, there was a

brief filed by *Ryan J. Walsh*, chief deputy solicitor general, with whom on the brief were *Brad D. Schimel*, attorney general, and *David H. Perlman*, assistant attorney general. There was an oral argument by *Ryan J. Walsh*, chief deputy solicitor general.

An amicus curiae brief was filed on behalf of Mothers Against Drunk Driving by *Kevin M. St. John* and *Bell Giftos St. John, LLC*, Madison, with whom on the brief was *Theane D. Evangelis*, *Lauren M. Blas*, and *Gibson, Dunn & Crutcher, LLP*, Los Angeles, California. There was an oral argument by *Lauren M. Blas*.

Appeal from a judgment of the Circuit Court.
Affirmed.

¶1 PATIENCE DRAKE ROGGENSACK, C.J. This appeal is before us on certification from the court of appeals.

¶2 Gerald Mitchell was convicted of operating while intoxicated and with a prohibited alcohol concentration, based on the test of blood drawn without a warrant while he was unconscious, pursuant to Wis. Stat. § 343.305(3)(b) (2013–14).[1] Mitchell contends that the blood draw was a search conducted in violation of his Fourth Amendment rights.

¶3 We conclude that Mitchell voluntarily consented to a blood draw by his conduct of driving on Wisconsin's roads and drinking to a point evidencing probable cause of intoxication. Further,

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[1] All subsequent references to the Wisconsin Statutes are to the 2013-14 version unless otherwise indicated.

through drinking to the point of unconsciousness, Mitchell forfeited all opportunity, including the statutory opportunity under Wis. Stat. § 343.305(4), to withdraw his consent previously given; and therefore, § 343.305(3)(b) applied, which under the totality of circumstances herein presented reasonably permitted drawing Mitchell's blood. Accordingly, we affirm Mitchell's convictions.

I. BACKGROUND

¶4 On the afternoon of May 30, 2013, officers from the City of Sheboygan Police Department were dispatched in response to a report that the caller had seen Mitchell, who appeared intoxicated, get into a gray van and drive away. Between 30 and 45 minutes later, Officer Alex Jaeger made contact with Mitchell. He found Mitchell walking near a beach. Mitchell was wet, shirtless and covered in sand. Mitchell's speech was slurred and he had difficulty maintaining his balance.

¶5 Mitchell admitted to Jaeger that he had been drinking prior to driving and that he continued drinking at the beach. He also stated that he had parked his vehicle "because he felt he was too drunk to drive." Nearby, officers found the gray van Mitchell was reported to have been driving.

¶6 After observing Mitchell's physical condition, Jaeger believed that it would not be safe to conduct standard field sobriety tests. Instead, he administered a preliminary breath test, which indicated a blood alcohol concentration (BAC) of 0.24.[2] Jaeger then arrested Mitchell for operating

[2] Preliminary breath tests are not sufficient evidence to prove prohibited alcohol concentrations at trial. Wis. Stat. § 343.303.

while intoxicated.

¶7 Following his arrest, and during the drive to the police station, Mitchell's physical condition deteriorated and his demeanor became more "lethargic." Upon arrival at the police station, it became apparent that an evidentiary breath test would not be feasible. Instead, Jaeger opted to transport Mitchell to a nearby hospital for a blood draw.

¶8 During the approximately eight-minute drive to the hospital, Mitchell "appeared to be completely incapacitated, [and] would not wake up with any type of stimulation." Upon arriving at the hospital, Mitchell needed to be transported in a wheelchair where he sat "slumped over" and unable to maintain an upright seating position.

¶9 After Mitchell entered the hospital emergency room, Jaeger read Mitchell the Informing the Accused form, thereby reading Mitchell the statutory opportunity to withdraw his consent to a blood draw. However, Mitchell was "so incapacitated [that] he could not answer." Jaeger directed hospital staff to draw a sample of Mitchell's blood.[3] They did so. Mitchell did not awaken during the procedure.

¶10 The blood draw occurred approximately one hour following Mitchell's arrest. The analysis of his blood sample showed a BAC of 0.222.

¶11 Mitchell was subsequently charged with driving with a prohibited alcohol concentration (PAC), as well as operating a motor vehicle while intoxicated (OWI), as a 7th offense. Prior to trial,

[3] There was no warrant sought prior to drawing Mitchell's blood.

Mitchell moved to suppress the results of the blood test. He alleged that the warrantless blood draw violated his rights under the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution.

¶12 In response to Mitchell's motion, the State contended that he had consented to the blood draw when he drove his van on Wisconsin highways according to a subsection of Wisconsin's implied-consent law, Wis. Stat. § 343.305(2). The State also contended that as an unconscious person, he is presumed not to have withdrawn his consent, pursuant to § 343.305(3)(b). The State expressly stated that it was not relying on exigent circumstances to justify the blood draw.

¶13 The circuit court [4] denied Mitchell's suppression motion in reliance on Wis. Stat. § 343.305(3)(b). The circuit court concluded that the officer had probable cause to believe that Mitchell was driving while intoxicated, and therefore, the blood draw was lawful. A jury convicted Mitchell of the OWI and PAC charges.

¶14 Mitchell appealed his conviction based on the sole contention that the warrantless blood draw violated his Fourth Amendment right to be free from "unreasonable searches and seizures."

¶15 The court of appeals, noting the opportunity to clarify the law in light of our recent decision in *State v. Howes*, 2017 WI 18, 373 Wis. 2d 468, 893 N.W.2d 812, [5] certified the following

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[4] The Honorable Terence T. Bourke of Sheboygan County presided.

[5] The court of appeals, noting that two of its prior cases had

questions: (1) whether "implied-consent," the potential for which is described in Wis. Stat. §§ 343.305(2) & (3)(a), which arises through a driver's voluntary conduct in operating a vehicle on Wisconsin roadways after drinking to intoxication, is constitutionally sufficient consent, and (2) whether a warrantless blood draw from an unconscious person pursuant to Wis. Stat. § 343.305(3)(b) violates the Fourth Amendment.

II. DISCUSSION

A. Standard of Review

¶16 Whether a suppression motion was properly denied presents a question of constitutional fact. *Howes*, 373 Wis. 2d 468, ¶17 (citing *State v. Tullberg*, 2014 WI 134, ¶27, 359 Wis. 2d 421, 857 N.W.2d 120). We will not set aside a circuit court's findings of historical fact unless they are clearly erroneous. *State v. Brereton*, 2013 WI 17, ¶17, 345 Wis. 2d 563, 826 N.W.2d 369. However, the application of those facts to Fourth Amendment principles presents a question of law that we review independently. *Id.*

B. Fourth Amendment General Principles

¶17 The Fourth Amendment to the United

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reached opposite conclusions, asked us to clarify whether implied consent is equivalent to constitutionally sufficient consent. *Compare State v. Padley*, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867 (holding that implied consent is not constitutionally sufficient consent), *with State v. Wintlend*, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745 (holding that implied consent is constitutionally sufficient). *See also Cook v. Cook*, 208 Wis. 2d 166, 171, 560 N.W.2d 246 (1997) (concluding that the court of appeals does not have the power to overrule or modify one of its published opinions).

States Constitution, and its Wisconsin counterpart, Article I, Section 11 of the Wisconsin Constitution,[6] protect persons' rights to "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV; Wis. Const. art. I, § 11. "As the text makes clear, the ultimate touchstone of the Fourth Amendment is reasonableness." *Riley v. California*, 573 U.S. __, 134 S. Ct. 2473, 2482 (2014) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). As a result, the Fourth Amendment does not prohibit all searches undertaken by government actors, but "merely proscribes those which are unreasonable." *Howes*, 373 Wis. 2d 468, ¶21 (quoting *Tullberg*, 359 Wis. 2d 421, ¶29 (quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991))).

¶18 Drawing blood is a search of the person. *Birchfield v. North Dakota*, 579 U.S. __, 136 S. Ct. 2160, 2173 (2016) (stating that "our cases establish that the taking of a blood sample or the administration of a breath test is a search"); *Howes*, 373 Wis. 2d 468, ¶20 (concluding that a blood draw is a search). Furthermore, a warrantless search is "presumptively unreasonable." *State v. Brar*, 2017 WI 73, ¶16, 376 Wis. 2d 685, 898 N.W.2d 499 (quoting *Tullberg*, 359 Wis. 2d 421, ¶30).

¶19 However, "there are certain 'specifically established and well-delineated' exceptions to the Fourth Amendment's warrant requirement." *Brar*, 376 Wis. 2d 685, ¶16 (quoting *State v. Williams*,

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[6] "Historically, we have interpreted Article I, Section 11 of the Wisconsin Constitution in accord with the Supreme Court's interpretation of the Fourth Amendment." *State v. Arias*, 2008 WI 84, ¶20, 311 Wis. 2d 358, 752 N.W.2d 748.

2002 WI 94, ¶18, 255 Wis. 2d 1, 646 N.W.2d 834). One such exception is a search conducted pursuant to consent. *Brar*, 376 Wis. 2d 685, ¶16. Warrantless consent searches are reasonable; and therefore, they are consistent with the Fourth Amendment. *Fernandez v. California*, 571 U.S. 292, 134 Ct. 1126, 1137 (2014); *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

C. Consent

¶20 In determining whether consent was given, we employ a two-step process. First, we examine whether relevant words, gestures or conduct supports a finding of consent. *State v. Artic*, 2010 WI 83, ¶30, 327 Wis. 2d 392, 786 N.W.2d 430. Second, we examine whether the consent was voluntarily given. *Id.*

1. Implied Consent

¶21 As we have explained, consent to search need not be given verbally. *State v. Phillips*, 218 Wis. 2d 180, 197, 577 N.W.2d 794 (1998) (citing *United States v. Griffin*, 530 F.2d 739, 741 (7th Cir. 1976); *United States v. Donlon*, 909 F.2d 650, 652 (1st Cir. 1990) *invalidated on other grounds by United States v. Omar*, 104 F.3d 519 (1st Cir. 1997)). Consent given through conduct "provides a sufficient basis on which to find that the defendant consented to the search." *Phillips*, 218 Wis. 2d at 197 (concluding that defendant's affirmative assistance in the search of his bedroom demonstrated his consent to the search). "Through conduct, an individual may impliedly consent to be searched." *Brar*, 376 Wis. 2d 685, ¶17.

¶22 In addition, the United States Supreme Court has recently explained that consent also may

be shown by the context in which consent arises. *Birchfield*, 136 S. Ct. at 2185. In *Birchfield*, the Court said that "[i]t is well established that a search is reasonable when the subject consents, and that sometimes consent to a search need not be express but may be fairly inferred from context." *Id.* (internal citations omitted). The Court's connection between context and consent was made in the course of *Birchfield's* review of searches incident to arrest for OWI in states that have implied-consent laws. *Birchfield* cited two cases that demonstrated constitutionally sufficient consent because of the context in which consent was lawfully implied: *Florida v. Jardines*, 569 U.S. 1 (2013) and *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

¶23 In *Jardines*, the Court, through Justice Scalia, recognized the sanctity of the home and that at the "very core" of the Fourth Amendment "stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion,'" and that this right extended to the curtilage of the home, including the home's front porch. *Jardines*, 569 U.S. at 6–7 (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

¶24 However, the Supreme Court also said that the sanctity of the curtilage of one's home is not absolute and certain permissions to enter may be implied. *Jardines*, 569 U.S. at 8. In *Jardines*, the Court recognized that by putting a knocker on his door, the homeowner had given implicit consent for visitors to approach and said that the implicit granting of such permission "does not require fine-grained legal knowledge." *Id.* Rather, law enforcement could approach a homeowner's front

door "precisely because that is 'no more than any private citizen might do.'" *Id.* (quoting *Kentucky v. King*, 563 U.S. 452, 469 (2011)). The Court recognized that a homeowner who places a knocker on his front door impliedly invites visitors to approach and enter upon the home's curtilage. *Jardines*, 569 U.S. at 8. Stated otherwise, in the context established by the homeowner, consent to enter the curtilage and approach the front door was given.

¶25 The other decision referenced in *Birchfield*, *Marshall v. Barlow's, Inc.*, noted that while generally the Fourth Amendment prohibits searches without a warrant, certain businesses and industries are subject to exception. *Marshall*, 436 U.S. at 313. Indeed, "pervasively regulated business[es]" and "'closely regulated' industries 'long subject to close supervision and inspection,'" are subject to warrant exceptions for certain searches. *Id.* (quoting *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 73-75, 77 (1970) (wherein the Court held that the statutory right to enter and inspect a facility authorized to serve liquor required no warrant for thesearch)).

¶26 The Fourth Amendment exception upheld in *Colonnade* was grounded in "unique circumstances" in that "[c]ertain industries have such a history of government oversight that no reasonable expectation of privacy, could exist for a proprietor over the stock of such an enterprise." *Marshall*, 436 U.S. at 313 (internal citation omitted). Referring to the liquor and firearms industries, the Court said that "when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full

arsenal of governmental regulation." *Id.* According to the Court, businesses in these industries are part of "a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." *Id.* By choosing to participate in certain businesses, the Court concluded that those persons had "accept[ed] the burdens as well as the benefits of their trade," in a manner different from other businesses and thus "in effect consents to the restrictions placed upon him." *Id.* Once again, it was the context in which such businesses are operated that evidenced voluntary consent to be subjected to significant governmental regulation. Stated otherwise, the context in which one operates a business involved in alcohol or firearms had a well-known history of significant governmental regulation such that an owner of such a business would have no reasonable expectation of privacy from governmental oversight of his business. *Id.*

¶27 *Birchfield's* discussion of the relationship between context and consent instructs that context is part of the totality of circumstances that courts should review when consent to search is at issue. In regard to the context of highway regulation, we note that the statutes at issue here are the legislature's attempt to stop the injuries and deaths drunken drivers inflict year after year on others who use Wisconsin highways.[7] That drunken driving has resulted in and

[7] The same is true across the nation. For example, it has been reported that in 2016 drunken driving took one life every 50 minutes in the United States. See National Highway Traffic Safety Administration, Drunk Driving, https://www.nhtsa.gov/risky-driving/drunk-driving (last visited June 25, 2018).

necessarily increased state regulation of the privilege of driving on public roadways is well known. Therefore, the context of well- publicized regulations forms part of the totality of circumstances we examine to determine whether a driver who has been arrested for OWI consented to be searched.

¶28 Some of the regulations to which drivers consent have never been challenged. For example, they agree to drive on the right side of the road, Wis. Stat. § 346.05; to yield the right- of-way to emergency vehicles, Wis. Stat. § 346.19; to comply with posted speed limits, Wis. Stat. § 346.57(4); and not to drive with a prohibited blood alcohol concentration, Wis. Stat. § 346.63(1)(b). While these regulations do not have implications for constitutional rights, drivers do not sign a form acknowledging these obligations each time they get into their vehicle; yet, they are held accountable and required to abide by each of them because they chose to drive a vehicle upon public highways.

¶29 Just as Wisconsin drivers consent to the above-listed obligations by their conduct of driving on Wisconsin's roads, in the context of significant, well-publicized laws designed to curb drunken driving, they also consent to an evidentiary drawing of blood upon a showing of probable cause to believe that they operated vehicles while intoxicated.[8] This qualified consent to search is required in order to exercise the privilege of driving in Wisconsin.[9] As *Birchfield* explained,

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[8] Of course, probable cause to believe that a driver is operating while intoxicated is sufficient to arrest thedriver.

[9] Probable cause to believe that a driver operated a vehicle while

implied consent laws condition "the privilege of driving on state roads and [] the privilege would be rescinded if a suspected drunk driver refused to honor that condition." *Birchfield*, 136 S. Ct. at 2169. Consent is complete at the moment the driver begins to operate a vehicle upon Wisconsin roadways if the driver evidences probable cause to believe that he or she is operating a vehicle while intoxicated. Wis. Stat. §§ 343.305(2) & (3)(a).[10]

¶30 As acknowledged by the United States Supreme Court, driving on state highways is a

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intoxicated is required before the driver must provide samples of breath, blood or urine. Wis. Stat. §§ 343.305(2) & (3)(a).

[10] The point in time when a driver consents has been described in various ways based on the facts of the case and the arguments of counsel. For example, in *Wintlend*, 258 Wis. 2d 875, the court of appeals addressed Wintlend's argument that the officer's reading the Informing the Accused form to him coerced consent. *Id.*, ¶8. The court rejected his argument and concluded that the statutory terms chosen by the legislature demonstrated that consent had been given before Wintlend was read the Informing the Accused form. *Id.*, ¶16.

In *State v. Neitzel*, 95 Wis. 2d 191, 289 N.W.2d 828 (1980), Neitzel's license was suspended for 60 days for his unreasonable refusal to permit chemical testing. *Id.* at 192. Neitzel argued that the refusal was not unreasonable because he had asked to consult his attorney before deciding and his request was denied. *Id.* at 193. In dismissing Neitzel's argument, we said that under the circumstances no right to counsel was provided. *Id.* We also explained that a driver must be arrested before he or she could be asked to submit to chemical testing, but custody at that point did not implicate a right to counsel. *Id.* at 200. Because the focus in Neitzel was on an alleged right to counsel, our discussion addressed that concern. However, our discussion herein explains why constitutionally sufficient consent occurs when a driver operates a vehicle on Wisconsin's highways and drinks or uses drugs to a point where the driver exhibits probable cause that he or she is intoxicated.

privilege; it is not a right. *Id.* In Wisconsin, it is a statutory privilege that comes with statutory obligations when that privilege is exercised. *Steeno v. State*, 85 Wis. 2d 663, 671, 271 N.W.2d 396 (1978) ("The granting of an automobile license to operate a motor vehicle is a privilege and not an inherent right.").

¶31 The United States Supreme Court recognized that implied consent laws are the context in which constitutionally sufficient consent for chemical testing may be given when it opined, "our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. . . . [N]othing we say here should be read to cast doubt on them." *Birchfield*, 136 S. Ct. at 2185.

¶32 *Birchfield* also established a "categorical" rule that a breath test does not implicate "significant privacy concerns," and therefore, a warrant is not needed to administer a breath test. *Birchfield*, 136 S. Ct. at 2176-84. This is an interesting conclusion because of the Court's previous statements that there are no bright-line rules for determining when a warrant is not required. *See Missouri v. McNeely*, 569 U.S. 141, 158 (2013). It is also interesting because a driver's bodily alcohol concentration can be determined from evidentiary breath tests as well as from blood tests.

¶33 *Birchfield* went on to explain, "It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit

to such a test. There must be a limit to the *consequences* to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." *Birchfield*, 136 S. Ct. at 2185 (emphasis added). The limit on the *consequences* of the decision to drive while intoxicated was the imposition of criminal penalties for refusing to permit a blood draw. *Id.*

¶34 Criminal penalties for withdrawing consent to a blood draw were beyond the scope of implied-consent laws because there was an insufficient nexus between the consequence of criminal penalties and choosing to drive on the highways in those states that imposed criminal penalties for withdrawing consent to provide a blood sample for testing. *Id.* at 2186. In Wisconsin, the consequences of refusing to permit a blood draw are civil and evidentiary, not criminal. Wis. Stat. § 343.305(4).

¶35 Relevant to assessing future challenges to refusal to submit to a blood draw, the Supreme Court adopted the following standard: motorists are "deemed to have consented to only those conditions that are 'reasonable' in that they have a 'nexus' to the privilege of driving and entail penalties that are proportional to severity of the violation." *Id.* When applying that standard, the Court concluded that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense [for refusing to submit]." *Id.* However, imposing "civil penalties and evidentiary consequences" on motorists who refuse to submit to a blood draw are permissible because civil penalties, such as license revocation, have a nexus to driving. *Id.* at 2185 (citing *McNeely*, 569 U.S. at

160-61).

¶36 Wisconsin imposes no criminal penalties for withdrawing consent previously given. The only criminal consequence imposed for drunken driving in Wisconsin arises from repeated OWI and PAC convictions and from convictions for causing injury or death by intoxicated use of a vehicle. *See generally* Wis. Stat. § 346.65. Criminal penalties do not arise from withdrawing consent to blood draws. Wis. Stat. § 343.305(4). All penalties for refusal are administrative and evidentiary. For example, a refusal that leads to a first OWI conviction subjects a defendant to a license suspension and a forfeiture but no jail time. Wis. Stat. §§ 343.305(4) & 346.65(1)(a).

¶37 Accordingly, we confirm that because it is constitutionally permissible to impose civil penalties as a consequence for refusing to submit to a blood draw, as Wis. Stat. § 343.305(4) provides, Wisconsin's implied-consent statutes, §§ 343.305(2) & (3)(a), describe a context consistent with *Birchfield* where constitutionally sufficient consent to search arises through conduct. *Birchfield*, 136 S. Ct. at 2185. Stated otherwise, it is not statutes that grant consent to search, but rather, consent is granted by the driver's exercising the privilege of driving on Wisconsin highways when he or she has imbibed sufficient alcohol or drugs to become intoxicated. Furthermore, if the consent that arises when a driver's conduct falls within §§ 343.305(2) & (3)(a) were not constitutionally sufficient consent for a blood draw, there would be no reason to provide a statutory opportunity to withdraw consent under § 343.305(4).

¶38 Furthermore, we presume that drivers know the laws applicable to the roadways on which they drive. *State v. Weber*, 2016 WI 96, ¶78, 372 Wis. 2d 202, 887 N.W.2d 554 (Kelly, J., concurring). Likewise, we also recognize, as has the United States Supreme Court, that in a state with civil penalties for refusal to submit to a blood draw, "a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test." *South Dakota v. Neville*, 459 U.S. 553, 560 n.10 (1983).

¶39 In *Neville*, the Supreme Court examined whether Neville's refusal to submit to a blood-alcohol test could be used as evidence of guilt for drunken driving at his trial. The circuit court of South Dakota had suppressed Neville's refusal to submit to a blood-alcohol test based on the circuit court's conclusion that evidence of refusal violated Neville's federal constitutional rights. *Id.* at 556. The Supreme Court reversed the suppression because Neville's "right to refuse the blood- alcohol test [] is simply a matter of grace bestowed by the South Dakota legislature," not a constitutional right. *Id.* at 565. As the Court further explained, because a driver had no constitutional right to refuse a blood-draw when there was probable cause to arrest for OWI, the driver's refusal could be used against him at trial as evidence of guilt. *Id.*; *see also Howes*, 373 Wis. 2d 468, ¶62 (Gableman, J., concurring) ("[A] driver has no statutory or constitutional right to refuse [blood alcohol testing] without consequences.").[11]

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[11] Justices Shirley Abrahamson, Ann Walsh Bradley, Rebecca Grassl Bradley and Daniel Kelly manufacture a constitutional right to refuse blood-draws to test for blood-alcohol content of

¶40 Of course, consent voluntarily-given before a blood draw may be withdrawn with or without a statutory reminder. *United States v. Sanders*, 424 F.3d 768, 774 (8th Cir. 2005). However, when consent is withdrawn, civil consequences may follow because the opportunity to withdraw voluntarily given consent is not of constitutional significance. *Neville*, 459 U.S. at 565; Wis. Stat. § 343.305(4).

¶41 The legitimacy of implied-consent laws has been supported repeatedly by the United States Supreme Court. In *McNeely*, the Court stated that "[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *McNeely*, 569 U.S. at 160 (quoting *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990)). The Court further recognized that "drunk driving continues to exact a terrible toll on our society," and that "all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." *McNeely*, 569 U.S. at 160–61.

¶42 Other states are in accord with our conclusion that drivers give constitutionally sufficient consent through driving on state

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drivers who operate vehicles while intoxicated, notwithstanding the United States Supreme Court's clearly stated explanation in *South Dakota v. Neville*, 459 U.S. 553, 560 n.10, 565 (1983), that drunken drivers have no constitutional right to refuse blood-alcohol testing. *State v. Dalton*, 2018 WI 85, ¶61, 383 Wis. 2d 147, 914 N.W.2d 120 (manufacturing a constitutional right for drunken drivers to refuse blood-alcoholtesting).

highways and drinking to a point evidencing probable cause of intoxication. For example, the Supreme Court of Colorado held that warrants need not be obtained for unconscious drivers as the result of their previously-given consent under Colorado's "Expressed Consent Statute." *People v. Hyde*, 393 P.3d 962 (Colo. 2017). The Colorado court recognized that "Hyde's statutory consent satisfied the consent exception to the Fourth Amendment warrant requirement." *Id.*, ¶3. Similarly, the Supreme Court of Kentucky has said that drivers "consent[] to testing by operating a vehicle in Kentucky." *Helton v. Commonwealth*, 299 S.W.3d 555, 559 (Ky. 2009).

¶43 As judicial opinions of other states, as well as the United States Supreme Court's prior statements show, "[i]mplied consent is not a second-tier form of consent." *Brar*, 376 Wis. 2d 685, ¶23. Rather, when a driver chooses to operate a vehicle upon Wisconsin's roads, he or she does so charged with knowing the laws of this state. *See Byrne v. State*, 12 Wis. 577 (*519), 580 (*521) (1860).

¶44 Those laws include Wis. Stat. §§ 343.305(2) & (3)(a) that function together. Section 343.305(2) provides that anyone who "drives or operates a motor vehicle upon the public highways of this state . . . is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of [alcohol or other prohibited substances], when requested to do so by a law enforcement officer." Section 343.305(3)(a) applies when a driver is arrested based on probable cause to believe that he or she is intoxicated, wherein a driver's conduct completes

his or her obligation to give samples of breath, blood or urine.

¶45 In the case before us, Mitchell chose to avail himself of the privilege of driving upon Wisconsin's roads. Because he did so while intoxicated, by his conduct he consented to the effect of laws that are relevant to exercising that privilege. He did not need to read them off one-by-one, and then sign a piece of paper acknowledging his consent to be subject to those rules and penalties for failing to follow them. By driving in Wisconsin, Mitchell consented to have samples of his breath, blood or urine taken upon the request of a law enforcement officer who had probable cause to believe he was intoxicated, unless he withdrew such consent. Wis. Stat. §§ 343.305(2) and (3)(a).

2. Voluntary Consent

¶46 A determination that consent has been given is not the end of our inquiry, we also must determine whether the consent was given "freely and voluntarily." *Artic*, 327 Wis. 2d 392, ¶32. "However, the State need not demonstrate that consent was given knowingly or intelligently." *Brar*, 376 Wis. 2d 685, ¶26 (citing *Schneckloth*, 412 U.S. at 241 ("Nothing, either in the purposes behind requiring a 'knowing' and 'intelligent' waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures.")). The concept of "'voluntariness' reflects an accommodation of complex, somewhat conflicting values." *Artic*, 327 Wis. 2d 392, ¶32 (citing *Schneckloth*, 412 U.S. at 224–25).

¶47 "The test for voluntariness is whether consent to search was given in the absence of duress or coercion, either express or implied." *Phillips*, 218 Wis. 2d at 197. In evaluating the voluntariness of consent, we evaluate "the totality of all the surrounding circumstances." *Artic*, 327 Wis. 2d 392, ¶32 (quoting *Schneckloth*, 412 U.S. at 226). No single criterion controls voluntariness. *Phillips*, 218 Wis. 2d at 197.

¶48 In making a determination of voluntariness, the State bears the burden to prove by clear and convincing evidence that consent was given voluntarily. *Id.* Our determination of the voluntariness of consent is a mixed question of fact and law. *Id.* In addition, voluntariness is a determination that we consider relative to Wis. Stat. §§ 343.305(2) & (3)(a) when a driver commences operation of his or her vehicle on Wisconsin roadways and under § 343.305(3)(b) when an unconscious driver has not availed himself of an opportunity to withdraw consent previously given.

¶49 Consent to search that arises in the context of Wisconsin's implied-consent laws is voluntary in one respect that is similar to the voluntariness of consent in *Colonnade* because Wisconsin has a long history of close governmental regulation of its highways in regard to drunken drivers. Stated otherwise, the privilege of driving on Wisconsin highways comes within the context of well-publicized requirements to provide samples of breath, blood or urine to law enforcement who have probable cause to believe that the driver is intoxicated.

¶50 We now further consider voluntary consent under four subsections of Wisconsin's implied-consent law at issue in the case before us: Wis. Stat. §§ 343.305(2), 343.305(3)(a), 343.305(4) and 343.305(3)(b).[12]

a. Wisconsin Stat. §§ 343.305(2) & (3)(a)

¶51 The voluntariness of consent by conduct that occurs when a driver commences operation of his vehicle on Wisconsin roadways is unequivocal and constitutionally sufficient when he or she evidences the indicia of intoxication such that there is probable cause to believe he or she is driving under the influence. Stated otherwise, voluntary consent arises through the effect of a driver's conduct in the context of Wisconsin law, Wis. Stat. §§ 343.305(2) and 343.305(3)(a).

¶52 Wisconsin Stat. § 343.305(2) clearly provides, "[a]ny person who . . . drives or operates a motor vehicle upon the public highways of this state . . . is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances . . . ." A driver's consent is conditioned on probable cause to believe he or she is intoxicated or has caused serious injury or death. As Wis. Stat. § 343.305(3)(a) provides, "Upon arrest

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[12] We note that other circumstances are impacted by Wisconsin implied consent law that we do not discuss here. *See* Wis. Stat. § 343.305(3)(ar)2., causing death or great bodily harm when there is reason to believe the driver violated state or local traffic law. Here, we limit our discussion to those circumstances where there are no facts in addition to probable cause to believe the driver was intoxicated.

of a person for violation of s. 346.63(1) [driving while intoxicated], (2m) [underage drinking], or (5) [commercial driver] or . . . (2) [causing injury] . . . a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine." Therefore, as an initial matter, one consents to search by driving on Wisconsin roadways when one has imbibed sufficient alcohol to support probable cause to arrest. The choice to drive on Wisconsin roadways and the choice to drink or ingest drugs to the point of probable cause to arrest for OWI are voluntary choices.

b. Wisconsin Stat. § 343.305(4)

¶53 Wisconsin Stat. § 343.305(4) provides a statutory opportunity to withdraw consent given under §§ 343.305(2) and (3)(a), when an officer has probable cause to arrest the driver. However, civil penalties may follow when consent is withdrawn. Section 343.305(4) provides in relevant part:

> You have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs . . . or you are the operator of a vehicle that was involved in an accident that caused the death of, great bodily harm to, or substantial bodily harm to a person . . . .
>
> This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. . . . If you refuse to take any test that this

> agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.[13]

It is helpful to keep subsection (4) in mind when discussing Wis. Stat. § 343.305(3)(b), which is central to thisappeal.

¶54 Wisconsin Stat. § 343.305(4) provides a statutory opportunity to withdraw consent, even though a driver has operated a vehicle on Wisconsin roads and has imbibed sufficient alcohol to be arrested for OWI. Of course, one may withdraw consent previously given with or without a statutory reminder. *See Sanders*, 424 F.3d at 774. Nevertheless, a driver may forfeit the driver's opportunity to withdraw consent by failing to timely engage it. *State v. Ndina*, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612. Furthermore, a defendant may forfeit an opportunity he or she otherwise would have by his or her conduct. *State v. Anthony*, 2015 WI 20, ¶59, 361 Wis. 2d 116, 860

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[13] Justices Shirley Abrahamson, Ann Walsh Bradley, Rebecca Grassl Bradley and Daniel Kelly strike down, sub silentio, Wis. Stat. § 343.305(4)'s provision that the fact of refusal can be used against a drunken driver in court because they label refusal of chemical testing a constitutional right. *Dalton*, 383 Wis. 2d 147, ¶61. However, the United States Supreme Court has concluded that refusing to take a blood test is not of constitutional significance and can be used against the defendant at trial. *Neville*, 459 U.S. at 565. The majority opinion in *Dalton* and the separate writings in this case will create confusion in Wisconsin courts on the admissibility of refusal evidence because *Neville* has not been overruled and remains authoritative on whether refusal is or is not a constitutional right.

N.W.2d 10.

¶55 Here, Mitchell drank sufficient alcohol to render himself unconscious. He had a BAC of 0.222. It is no wonder that he passed out. [14] Through this conduct, he forfeited all opportunity to withdraw the consent to search that he had given.

c. Wisconsin Stat. § 343.305(3)(b)

¶56 Mitchell was unconscious when his blood was drawn. Wisconsin Stat. § 343.305(3)(b) addresses blood draws from unconscious persons who have not availed themselves of the statutory opportunity that is provided by § 343.305(4) or otherwise taken steps to withdraw consent. Some who are unconscious have imbibed sufficient alcohol or drugs to render themselves unconscious; others may be unconscious due to an injury sustained in an accident. Section 343.305(3)(b) provides in relevant part:

> A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection, and if a law enforcement officer has probable cause to believe that the person has violated s. 346.63(1) [driving while intoxicated], (2m) [underage drinking] or (5) [commercial driver] . . . [or caused

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[14] *See* National Institute on Alcohol Abuse and Alcoholism, Alcohol Overdose: The Dangers of Drinking Too Much, https://pubs.niaaa.nih.gov/publications/AlcoholOverdoseFactsheet/Overdosefact.htm (Oct. 2015).

injury] one or more samples specified in par. (a) or (am) may be administered to the person.

¶57 The Fourth Amendment question is whether drawing Mitchell's blood while he was unconscious was unreasonable and therefore in violation of Fourth Amendment's prohibitions against unreasonable searches. Mitchell claims the blood draw was unreasonable because he was unconscious when the Informing the Accused form was read to him. The State claims that the blood draw was reasonable because Jaeger had arrested Mitchell for driving while intoxicated.[15]

¶58 Mitchell's self-induced physical condition does not render Wis. Stat. § 343.305(3)(b)'s presumption unreasonable under the totality of circumstances applicable to our Fourth Amendment discussion. First, by exercising the privilege of driving on Wisconsin highways,

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[15] The State's contention could be read to assert that the blood draw was a search incident to arrest within the traditional exception to the Fourth Amendment's warrant requirement.

Mitchell's blood draw parallels the search incident to arrest doctrine, as probable cause to arrest Mitchell for driving while intoxicated is fully supported by the record. That a search incident to arrest is an exception to the warrant requirement is an important principle to keep in mind. This is so because all unconscious drivers are not subjected to a blood draw under Wisconsin implied consent laws. Only those drivers for whom "a law enforcement officer has probable cause to believe that the person has violated [laws regulating use of intoxicants]" can be searched. Wis. Stat. § 343.305(3)(b). This limitation also is consistent with the reasonableness requirement of the Fourth Amendment. For an unconscious driver, a blood draw is the only means by which to obtain evidence of the crime for which he or she has been charged.

Mitchell's conduct demonstrated consent to provide breath, blood or urine samples to be tested in accord with §§ 343.305(2) & (3)(a) if law enforcement had probable cause to believe that he had operated his vehicle while intoxicated. Second, Jaeger had probable cause to arrest Mitchell for driving while intoxicated. His speech was slurred; he smelled of alcohol; he had difficulty maintaining his balance; his preliminary breath test showed a BAC of 0.24, which indicates significant intoxication. Third, Mitchell chose to drink sufficient alcohol to produce unconsciousness. Fourth, by his conduct, Mitchell forfeited the statutory opportunity to assert that he had "withdrawn consent" he previously gave. *Ndina*, 315 Wis. 2d 653, ¶29; *Anthony*, 361 Wis. 2d 116, ¶59.

¶59 Therefore, under the totality of circumstances as applied to Mitchell, Wis. Stat. § 343.305(3)(b)'s presumption is reasonable. Accordingly, drawing Mitchell's blood was reasonable, and no Fourth Amendment violation occurred.

¶60 Because we conclude that consent given by drivers whose conduct falls within the parameters of Wis. Stat. § 343.305 is constitutionally sufficient consent to withstand Fourth Amendment scrutiny, and although consent must be voluntary, it need not be knowing, we overrule *State v. Padley*, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867. We do so for two reasons. First, we clarify that *Padley* has no precedential effect because its holding is in direct conflict with an earlier, published court of appeals decision, *State v. Wintlend*, 2002 WI App 314, 258 Wis. 2d

875, 655 N.W.2d 745. *Cook v. Cook*, 208 Wis. 2d 166, 171, 560 N.W.2d 246 (1997) (concluding that the court of appeals cannot overrule or modify one of its published opinions). Second, *Padley* is simply wrong as a matter of law. There, the court of appeals said that "implied consent" is different than "actual consent," and that actual consent is given only when a driver affirms his or her previously-given implied consent after being read the Informing the Accused form. *See Padley*, 354 Wis. 2d 545, ¶38. The court also incorporated the concept of "knowingly" into consent law. *Id.*, ¶62. Under the reasoning in *Padley*, driving on Wisconsin highways and drinking, using drugs or being involved in an accident causing death or serious bodily injury while violating a state or local traffic law does not provide constitutionally sufficient consent through conduct. We conclude otherwise.

¶61 The question that remains in regard to Mitchell is whether Wis. Stat. § 343.304(3)(b)'s presumption that consent has not been withdrawn is reasonable for a driver who has suffered an injury rendering him or her unconscious, but for whom there is probable cause to believe that he or she operated a vehicle in violation of laws regulating the use of intoxicants.

¶62 We begin by noting that all drivers, by their conduct, consent to provide samples of their breath, blood or urine when requested by law enforcement personnel who have probable cause to arrest for driving while intoxicated. Wis. Stat. §§ 343.305(2) & (3)(a). We also recognize that consent to search once given may be withdrawn. *See Sanders*, 424 F.3d at 774. Although no magic words

are required to withdraw consent, the intent to withdraw must be unequivocal. *Id.* Withdrawal of consent given under implied-consent laws also may be withdrawn. Wisconsin Stat. § 343.305(4) reminds drivers of the opportunity to "withdraw" consent previously given. *See also State v. Arrotta*, 339 P.3d 1177, 1178 (Idaho 2014) (concluding that under Idaho implied-consent laws, a suspected drunken driver can withdraw his or her consent to test for the presence of alcohol). However, for many unconscious drivers, it may be that they have taken no steps to demonstrate unequivocal intent to withdraw consent previously given.

¶63 Furthermore, the opportunity to refuse a blood test when there is probable cause to believe the driver is intoxicated is not of constitutional significance, as is shown by Supreme Court jurisprudence concluding that withdrawal of consent may be used as evidence of guilt at trial. *State v. Crandall*, 133 Wis. 2d 251, 255, 394 N.W.2d 905 (1986) (citing *Neville*, 459 U.S. at 565 (concluding that it is not "fundamentally unfair for South Dakota to use the refusal to take the test as evidence of guilt, even though respondent was not specifically warned that his refusal could be used against him at trial")).

¶64 In addition, Wis. Stat. § 343.305(3)(b)'s presumption affects only unconscious drivers for whom law enforcement has probable cause to believe that the driver has violated statutory proscriptions on use of intoxicants. Therefore, those drivers who are unconscious but for whom law enforcement does not have probable cause to believe they drove while intoxicated will not be subject to the presumption of § 343.305(3)(b).

¶65 For drivers for whom the presumption applies, Wis. Stat. § 343.305(3)(b) is consistent with United States Supreme Court precedent that a warrantless search at arrest does not violate the Fourth Amendment when there is consent given prior to the search. *United States v. Robinson*, 414 U.S. 218, 224 (1373); *Schneckloth*, 412 U.S. at 222. Therefore, we conclude that under the totality of circumstances the presumption of § 343.305(3)(b) is reasonable. Accordingly, it does not violate Fourth Amendment rights of one for whom law enforcement has probable cause to believe he or she operated a vehicle after consuming alcohol or drugs to the point of intoxication.

III. CONCLUSION

¶66 We conclude that Mitchell voluntarily consented to a blood draw by his conduct of driving on Wisconsin's roads and drinking to a point evidencing probable cause of intoxication. Further, through drinking to the point of unconsciousness, Mitchell forfeited all opportunity, including the statutory opportunity under Wis. Stat. § 343.305(4), to withdraw his consent previously given; and therefore, § 343.305(3)(b) applied, which under the totality of circumstances reasonably permitted drawing Mitchell's blood. Accordingly, we affirm Mitchell's convictions.

By the Court.—The judgment of the circuit court is affirmed.

¶67 DANIEL KELLY, J. *(concurring).* I do not believe the state can waive the people's constitutional protections against the state. I nonetheless concur because performing a blood draw on an unconscious individual who has been arrested for operating a motor vehicle while intoxicated in violation of Wis. Stat. § 346.63 ("OWI") is reasonable within the meaning of the Fourth Amendment to the United States Constitution.[1]

¶68 This is not the first time we have considered whether a law enforcement officer may perform a blood draw on an individual pursuant to "consent" granted by Wis. Stat. § 343.305. Last term we considered whether such "implied consent" can satisfy the requirements of the Fourth Amendment to the United States Constitution. *See State v. Brar*, 2017 WI 73, ¶¶15, 28-29, 376 Wis. 2d 685, 898 N.W.2d 99 (lead opinion). No opinion attracted a majority of the court. I concurred because Mr. Brar was conscious and had provided express consent to a blood draw, a point on which a majority of the court agreed. However, because the court nonetheless addressed the constitutionality of the implied consent statute, I also explained why I believe that "implied consent" is actually consent granted by the legislature, not the suspect, and why legislative consent cannot satisfy the mandates of our State and Federal Constitutions. *See id.*, ¶¶44, 59 (Kelly, J., concurring); *see also id.*, ¶15 & n.6 (lead opinion) (discussing federal and state constitutional provisions). I incorporate that analysis here *in toto.*

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[1] I join paragraphs 1-2 and 4-28 of the lead opinion.

¶69 The court today is even more ambitious than it was in *Brar*. Legislatively-granted consent to perform a blood draw is justified, the court says, for the same reasons certain searches of pervasively-regulated businesses do not require warrants. Lead op., ¶¶25-28 (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970)). But the court misunderstands the significance of that line of cases. The searches considered there were not reasonable because a legislature said they were; they were reasonable because they did not intrude on the affected person's reasonable expectation of privacy. In *Colonnade Catering*, for example, the United States Supreme Court surveyed the regulatory history of the liquor industry, reaching as far back as England of the eighteenth century. *Colonnade Catering*, 397 U.S. at 75. The whole point of rehearsing that history was to demonstrate that a liquor retailer had no reasonable expectation his premises would be free from regular governmental inspection. *See id.* Therefore, the congressionally-developed inspection regime at issue in *Colonnade Catering* was constitutional because it operated in an area in which the retailer had no reasonable expectation of privacy. The United States Supreme Court has treated the firearm industry in a similar fashion. In *United States v. Biswell*, 406 U.S. 311 (1972), the Court said "[i]t is also apparent that if the law is to be properly enforced and inspection made effective, inspections without warrant must be deemed reasonable official conduct under the Fourth Amendment." *Id.* at 316. Although the Court chose a stilted means of explaining itself, it is apparent the Court had concluded that the

inspection regime in that case did not reach into an area in which the pawn dealer had a reasonable expectation of privacy. *See id.* The "pervasive-regulation" doctrine, therefore, allows warrantless inspection regimes only when the nature of the business at issue is such that the proprietor does not have an expectation of privacy.

¶70 The court should not venture into the "pervasive- regulation" arm of Fourth Amendment jurisprudence without a great deal of fear and trepidation. The rationale justifying this doctrine is too easy to abuse. If increased regulation decreases the areas in which individuals have a reasonable expectation of privacy, then the Fourth Amendment's protections are effectively contingent on the reach of the regulatory state. Through combined legislative and executive activity, oceans of regulations can wear away zones of privacy, allowing warrantless inspection regimes to follow in their wake.

¶71 Today's decision is a good example of the doctrine's erosive power. Driving, the court observes, is subject to many regulations, what with all the rules about staying on the right side of the road, speed limits, interactions with emergency vehicles, et cetera. The court could have mined that vein even more deeply than it did——under any definition, driving truly is pervasively-regulated. The temptation to reach for the doctrine under these circumstances is nearly irresistible. And why wouldn't it be? It fairly demands to be heard here. But this is a powerful and unruly force, and when the United States Supreme Court set it in motion, it impressed on the doctrine no internal logic capable of limiting its reach.

¶72 The court thinks to wield this doctrine here with limited effect——after all, we are simply justifying a warrantless blood draw. But the court misapprehends how the doctrine functions and, therefore, its consequences. If we are of a mind that this doctrine justifies the implied consent law, we may do so only if we first conclude that regulatory pervasiveness has removed the subject of its operation from the reasonable expectation of privacy. *See Colonnade Catering*, 397 U.S. at 75; *Biswell*, 406 U.S. at 316. That is to say, because driving is pervasively regulated, those who travel on Wisconsin's highways have no reasonable expectation of privacy as they engage in that activity. And if that is true, it would sweep away a large body of Fourth Amendment jurisprudence as it relates to traffic stops, searches of automobiles, searches of drivers and passengers, et cetera. Wielding this doctrine as the court does today, if we are serious about its application, calves off a substantial piece of the Fourth Amendment.

¶73 For these reasons, and the reasons I discussed in my *Brar* concurrence, I conclude that the consent implied by Wis. Stat. § 343.305 cannot justify the blood draw performed on Mr. Mitchell.

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¶74 But this case is not *Brar*, and different reasons justify the blood draw here. The most important distinction between the two cases is this: Mr. Mitchell was not conscious when the law enforcement officer determined that a blood draw was necessary. No Supreme Court decision has yet opined directly on whether a warrant is necessary to perform a blood draw under these circumstances;

I believe the interplay among *Schmerber v. California*, 384 U.S. 757 (1966), *Missouri v. McNeely*, 569 U.S. 141 (2013), and *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), leave that question open. Their combined rationale, however, indicates that no warrant is necessary to perform a blood draw when an individual has been arrested for OWI, the suspect is unconscious, and there is a risk of losing critical evidence through the human body's natural metabolization of alcohol.

¶75 For more than half a century now the United States Supreme Court has recognized that warrantless blood draws can be constitutional. In *Schmerber*, the Supreme Court recognized that exigent circumstances can justify a warrantless blood draw from an individual arrested on OWI charges. *See Schmerber*, 384 U.S. at 770-71. It said the human body's natural metabolization of alcohol could, under the right circumstances, cause an officer to "reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" *Id.* at 770 (citation omitted).

¶76 More recently, the State of Missouri pressed the Supreme Court to adopt a rule that the natural metabolization of alcohol in the bloodstream presents a per se exigency. *McNeely*, 569 U.S. at 151-52. The Court refused, but confirmed the continuing vitality of the rule that the proper circumstances will still justify a warrantless blood draw. "We do not doubt," the Court said, "that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will

support an exigency justifying a properly conducted warrantless blood test." *Id.* at 153. Therefore, "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." *Id.* at 156.

¶77 The constitutionality of a warrantless blood draw returned to the Supreme Court in the context of the "search incident to arrest" doctrine in *Birchfield*, 136 S. Ct. at 2179, 2185. There, the Court said this doctrine justifies a warrantless breath test when the individual has been arrested for OWI; however, it does not justify a warrantless blood draw (at least when the suspect is conscious). *See id.* at 2185. In reaching this conclusion, the Court placed heavy emphasis on the differing levels of intrusiveness between the two tests. *Id.* at 2178. Thus, for example, it said that "[b]ecause breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving." *Id.* at 2185.

¶78 Availability of the breath test, however, was the driving motivation for its ruling. In the absence of such an option, the reasonableness of a warrantless blood test increases:

> We reach a different conclusion with respect to blood tests. Blood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test.

> Respondents have offered no satisfactory justification for demanding the more intrusive alternative without a warrant.

Id. at 2184.

¶79 Combining the reasoning of *Schmerber*, *McNeely*, and *Birchfield* provides the necessary guidance for Mr. Mitchell's case. *Schmerber* established the ground-rule principle that a warrantless blood draw can be constitutional. *See Schmerber*, 384 U.S. at 770-71. *McNeely* refined the *Schmerber* holding when it explained that, under the right circumstances, "the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test." *See McNeely*, 569 U.S. at 153. *Birchfield* added two important pieces to the analysis. First, it established that an individual arrested for OWI may be searched incident to his arrest for evidence of intoxication without a warrant. *See Birchfield*, 136 S. Ct. at 2184. And second, it determined that the method by which law enforcement conducts the search (by breath test as opposed to blood test) depends on the availability of the less-intrusive option. *See id.* at 2185.

¶80 Here is how the Supreme Court's instructions apply in this case. Mr. Mitchell, of course, was arrested for OWI, so *Schmerber* and *McNeely* recognize that critical evidence of his intoxication was continually metabolizing away. They also explain that although metabolization alone would not support a warrantless blood draw, when combined with other elements it may. *Birchfield* says his privacy interest in the evidence

of intoxication within his body is no longer a factor because the "search incident to arrest" doctrine is a recognized exception to the warrant requirement. So the only question remaining is whether the search should be conducted via a breath test or a blood test. *Birchfield* tells us that we must consider the availability of the less intrusive test in making this decision. Mr. Mitchell, however, was unconscious, so the breath test was not an option. A warrantless blood test was reasonable, therefore, because he had been arrested for OWI, evidence of the offense was continually dissipating, there was no telling how long he would be unconscious, his privacy interest in the evidence of intoxication within his body had been eviscerated by the arrest, and no less intrusive means were available to obtain the evanescent evidence.

¶81 I recognize that *Birchfield* holds a cautionary note about blood tests performed on unconscious suspects, but it appears to be in the form of an explanation for why the Court devoted just two sentences to the subject:

> It is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries. But we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be.

Birchfield, 136 S. Ct. at 2184-85. Nothing in the opinion indicates the Supreme Court considered how its analytical structure would apply in the context of an unconscious suspect arrested for OWI, and it would be too much like reading tea leaves to give any substantive weight to a statement that simply gives the Court's reasons for not addressing the question we are deciding.[2]

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[2] The dissent believes *Birchfield* has already answered this question, and therefore concludes my "analytical exercise ultimately fails because it cannot be reconciled with *Birchfield's* central holding: 'a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving.'" Dissent, ¶101 n.6 (quoting *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016)) (emphasis omitted). The Supreme Court stated that central holding, however, in the context of a suspect who, unlike Mr. Mitchell, was conscious. This is a distinction that *Birchfield* itself advanced, so it's entirely justifiable to explore its significance, as I have done in this opinion.

But there is an even more important reason the dissent should be chary of finding such a categorical prohibition in that precedent: *Birchfield* is not comfortable in its own skin. Its central logic is actually self-contradictory, which explains why both the court and the dissent are able to call on it for support. If the Supreme Court had endorsed implied-consent laws as sufficient to authorize a breath or blood test (as our court says), then it would have held that implied consent justified the breath test. But it didn't. It said the "search incident to arrest" exception to the Fourth Amendment's warrant requirement justified the breath test. On the other hand, if *Birchfield* forbids blood draws pursuant to an implied-consent law, as the dissent claims, then such a law could not justify the breath test either, inasmuch as the law either provides constitutionally-sound consent for both, or forneither.

So I disagree with the dissent that I cannot reconcile my analytical exercise to *Birchfield's* central holding. When the Supreme Court speaks with two contradictory voices in one opinion, the best we can do is follow its logic until it starts

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¶82 Apropos of nothing relevant to this case, the lead opinion says a quartet of the court's members, including the author of this concurrence and the justice who joins it, "label refusal of chemical testing a constitutional right [in *State v. Dalton*, 2018 WI 85, ¶61, 383 Wis. 2d 147, 914 N.W.2d 120]." *See* lead op., ¶53 n.13. If the lead opinion means to say that we understand the people of Wisconsin have a constitutionally-protected right to be free from warrantless, unreasonable searches, then it is spot-on. And if the lead opinion further means to say that we recognize that the people of Wisconsin may operationalize that constitutionally-protected right by refusing warrantless, unreasonable searches, then it again hits the bulls-eye. But none of that happened in *Dalton*. It happened when the people of this nation ratified the Bill of Rights. We have done nothing new here; we only recognize what is already the law.

¶83 Ultimately, the lead opinion is of two minds on whether a suspect may refuse a blood test, and it expressed both of them. On the one hand, it says that, "in a state with civil penalties for refusal to submit to a blood draw, 'a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test.'" Lead op., ¶38 (quoting *South Dakota v. Neville*, 459 U.S.

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contending with itself. Here, that means *Birchfield* stands for the proposition that, with respect to conscious drunk-driving suspects, the "search incident to arrest" doctrine covers breath tests, but not blood draws. Because Mr. Mitchell was not conscious, *Birchfield* does not control the disposition of this case.

553, 560 n.10 (1983)). But almost immediately afterwards it also said: "Of course, consent voluntarily-given before a blood draw may be withdrawn with or without a statutory reminder." Lead op., ¶40 (citing *United States v. Sanders*, 424 F.3d 768, 774 (8th Cir. 2005)). So which is it? May a suspect refuse a blood test or not?

¶84 Perhaps, however, the lead opinion means to say that when a blood test is conducted pursuant to consent——real consent, the kind that people provide, not legislatures——the consent can be withdrawn, but when conducted pursuant to legislatively-provided consent, it cannot. That seems to be the import of the observation that the "right to refuse the blood- alcohol test . . . is simply a matter of grace bestowed by the . . . legislature." *See* lead op., ¶39 (quoting *Neville*, 459 U.S. at 565). But if that is so, what possible jurisprudential theory allows a statute to make permanent what the constitution makes revocable?[3]

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¶85 For these reasons, I respectfully concur in our court's mandate.

¶86 I am authorized to state that Justice REBECCA GRASSL BRADLEY joins this

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[3] The right to refuse a search, and to revoke consent once given, has been a part of Fourth Amendment jurisprudence for a very long time. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (stating that consent may be refused); *United States v. Carter*, 985 F.2d 1095, 1097 (D.C. Cir. 1993) (stating that consent may be withdrawn); *United States v. Black*, 675 F.2d 129, 138 (7th Cir. 1982) (same); *Mason v. Pulliam*, 557 F.2d 426, 428 (5th Cir. 1977) (stating that nothing in *Schneckloth* prevents consent from being withdrawn).

concurrence.

¶87 ANN WALSH BRADLEY, J. *(dissenting).* A blood draw is a particularly intrusive search. It invades the interior of the human body and implicates interests in human dignity and privacy. *Schmerber v. California*, 384 U.S. 757, 769-70 (1966). To allow a blood draw without a warrant runs counter to these significant interests, not to mention United States Supreme Court precedent.

¶88 The police took Gerald Mitchell's blood without a warrant while he was unconscious. According to the lead opinion[1], this is perfectly fine

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[1] I use the term "lead" opinion for two reasons. First, I am concerned that without this cue, the reader may mistakenly believe that the lead opinion has any precedential value. Although five justices join in the mandate of the opinion to affirm the court of appeals (Roggensack, C.J., joined by Ziegler, J., Gableman, J., Rebecca Grassl Bradley, J., and Kelly, J.,), it represents the reasoning of only three justices (Roggensack, C.J., joined by Ziegler, J., and Gableman, J.). Justices Rebecca Grassl Bradley and Kelly joined in the mandate, but they would rely on contrary reasoning. Other paragraphs of the lead opinion that Justice Kelly indicates that he joins provide only uncontested factual and legal background that do not include the lead opinion's reasoning. *See* Justice Kelly's concurrence, ¶67 n.1.

Although set forth in two separate opinions, four justices disagree with the reasoning of the lead opinion. Importantly, contrary to the lead opinion, four justices determine that the implied consent laws cannot justify the warrantless blood draw performed in this case (Abrahamson, J., Ann Walsh Bradley, J., Rebecca Grassl Bradley, J., and Kelly, J.).

The lead opinion fails to alert readers as to the non- precedential status of its essential reasoning. Lest the rule of law be unclear to courts and litigants: BY THEMSELVES, THE IMPLIED CONSENT LAWS CANNOT JUSTIFY A WARRANTLESS BLOODDRAW.

because Mitchell by implication "voluntarily consented" to a blood draw and, while he was unconscious, did not revoke such consent.

¶89 Contrary to the lead opinion, I determine that "implied consent" is not the same as "actual consent" for purposes of a Fourth Amendment search. By relying on the implied consent laws, the lead opinion attempts to create a statutory per se exception to the constitutionally mandated warrant requirement. Thus, it embraces a categorical exception over the constitutionally required consideration of the totality of the circumstances. Consent provided solely by way of an implied consent statute is constitutionally untenable.[2]

¶90 Accordingly, I respectfully dissent.

I

¶91 Mitchell was arrested for operating while intoxicated. En route to a nearby hospital, he lost consciousness. Despite Mitchell's incapacitation, a police officer read him the Informing the Accused form. Mitchell provided no response because he was unconscious. The officer then directed hospital staff to draw a sample of Mitchell's blood, and they did so. Mitchell remained unconscious as his skin was pierced and his blood taken.

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[2] I observe that the concurrence and this dissent are in accord on this point. The concurrence "do[es] not believe that the state can waive the people's constitutional protections against the state." Concurrence, ¶67. Accordingly, it concludes that "the consent implied by § 343.305 cannot justify the blood draw performed on Mr. Mitchell." *Id.*, ¶73.

¶92 Seeking to exclude the evidence obtained as a result of the blood draw, Mitchell filed a motion to suppress. He premised his motion on the contention that the warrantless taking of his blood while he was unconscious violated his Fourth Amendment rights.

¶93 The lead opinion rejects Mitchell's argument, concluding that the consent exception to the Fourth Amendment's warrant requirement applies. Lead op., ¶3. According to the lead opinion, Mitchell "voluntarily consented to a blood draw by his conduct of driving on Wisconsin's roads and drinking to a point evidencing probable cause of intoxication." *Id.* Further, in the lead opinion's view, Mitchell "forfeited all opportunity, including the statutory opportunity under Wis. Stat. § 343.305(4), to withdraw his consent previously given . . . ." *Id.*

II

¶94 The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect against unreasonable searches and seizures. *State v. Eason*, 2001 WI 98, ¶16, 245 Wis. 2d 206, 629 N.W.2d 625. A warrantless search is presumptively unreasonable unless an exception to the warrant requirement applies. *State v. Tullberg*, 2014 WI 134, ¶30, 359 Wis. 2d 421, 857 N.W.2d 120.

¶95 One such exception to the warrant requirement is a search conducted pursuant to consent. *State v. Artic*, 2010 WI 83, ¶29, 327 Wis. 2d 392, 786 N.W.2d 430. The lead opinion correctly states that relevant words, gestures or conduct may support a finding of consent. Lead op., ¶20 (citing

Artic, 327 Wis. 2d 392, ¶30).[3] However, it errs by departing from Mitchell's "words, gestures or conduct" to determine that he *impliedly* consented for the state to draw his blood.

¶96 The lead opinion's conclusion is based on Wisconsin's implied consent laws, one subsection of which provides that any person operating a motor vehicle in Wisconsin "is deemed to have given consent to one or more tests of his or her breath, blood or urine" when requested to do so by a law enforcement officer in certain circumstances. Wis. Stat. § 343.305(2).

¶97 Another subsection specifically addresses the situation where a driver is unconscious. Wisconsin Stat. § 343.305(3)(b) provides that "[a] person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection." It further states that a law enforcement officer may administer a breath, blood, or urine test if probable cause exists that the driver has committed any of a list of offenses. *Id.*

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[3] The lead also cites *State v. Phillips*, 218 Wis. 2d 180, 197, 577 N.W.2d 794 (1998), for the proposition that consent to search need not be given verbally. Lead op., ¶21. In *Phillips*, when asked by law enforcement whether they could search the defendant's bedroom, "the defendant did not respond verbally, but he opened the door to and walked into his bedroom, retrieved a small baggie of marijuana, handed the baggie to the agents, and pointed out a number of drug paraphernalia items." 218 Wis. 2d at 197. The court concluded that "[t]he defendant's conduct provides a sufficient basis on which to find that the defendant consented to the search of his bedroom." *Id.* The affirmative assistance provided by the defendant in response to a request to search in *Phillips* is a far cry from the complete lack of response from the defendant here.

¶98. In determining whether the warrantless taking of a blood draw from an unconscious person pursuant to Wis. Stat. § 343.305(3)(b) violates the Fourth Amendment, I begin my analysis with *Birchfield v. North Dakota*, 579 U.S. __, 136 S. Ct. 2160 (2016). In *Birchfield*, the United States Supreme Court determined that "a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving." *Id.* at 2185.

¶99 *Birchfield* emphasized the invasive nature of a blood test, which is significant for Fourth Amendment purposes. *See id.* at 2184. In comparison to a breath test, a blood test is "significantly more intrusive[.]" *Id.* As an intrusion "beyond the body's surface," a blood test implicates paramount "interests in human dignity and privacy[.]" *Id.* at 2183 (citing *Schmerber*, 384 U.S. at 769-70). Indeed, a blood test can provide a lot more information than just a person's blood alcohol content.[4]

¶100 The *Birchfield* court further addressed the precise circumstances that have arisen in this case:

> It is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as

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[4] "[A] blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested." *Birchfield v. North Dakota*, 579 U.S. __, 136 S. Ct. 2160, 2178 (2016).

> a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries. But we have no reason to believe that such situations are common in drunk-driving arrests, and *when they arise, the police may apply for a warrant if need be.*

136 S. Ct. at 2184-85 (emphasis added).

¶101 This language compels a single conclusion: law enforcement needed a warrant here. First, the State concedes that there were no exigent circumstances that would justify a departure from the warrant requirement.[5] Second, the ultimate holding in *Birchfield* was that a blood test cannot be administered as a search incident to arrest for drunk driving. *Id.* at 2185. The lead opinion's interpretation of the implied consent statutes attempts to accomplish exactly what the *Birchfield* court said violates the Fourth Amendment——a blood test as a search incident to the arrest of an unconscious person for drunk driving.[6]

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[5] *See State v. Tullberg*, 2014 WI 134, ¶30, 359 Wis. 2d 421, 857 N.W.2d 120.

[6] The concurrence focuses on language in *Birchfield* stating a blood test's "reasonableness must be judged in light of the availability of the less intrusive alternative of a breath test." *Birchfield*, 136 S. Ct. at 2184; *see* concurrence, ¶¶77-79. It creatively interprets this language to indicate that, because a breath test was unavailable due to Mitchell's unconsciousness, a blood test was constitutionally reasonable. *Id.*, ¶80. The concurrence's analytical exercise ultimately fails because it cannot be reconciled with *Birchfield*'s central holding: "a breath test, *but not a blood test*, may be administered as a search

¶102 Unlike the lead opinion, I would follow, rather than attempt to overrule, the court of appeals in *State v. Padley*, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867. The *Padley* court emphasized that, when analyzing whether there was a consensual search, the determining factor was whether the driver gave *actual* consent to the blood draw:

> [T]he implied consent law is explicitly designed to allow the driver, and not the police officer, to make the choice as to whether the driver will give or decline to give *actual* consent to a blood draw when put to the choice between consent or automatic sanctions. Framed in the terms of "implied consent," choosing the "yes" option affirms the driver's implied consent and constitutes actual consent for the blood draw. Choosing the "no" option acts to withdraw the driver's implied consent and establishes that the driver does not give actual consent.

354 Wis. 2d 545, ¶39. As Justice Abrahamson has

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incident to a lawful arrest for drunk driving." *Birchfield*, 136 S. Ct. at 2185 (emphasisadded).

Federal and state courts around the country have cited the "but not a blood test" language a multitude of times. *See, e.g., Robertson v. Pichon*, 849 F.3d 1173, 1184 n.7 (9th Cir. 2017; *Espinoza v. Shiomoto*, 215 Cal. Rptr. 3d 807, 829 (Ct. App. 2017); *State v. Ryce*, 396 P.3d 711, 717 (Kan. 2017); *State v. Reynolds*, 504 S.W.3d 283, 307 (Tenn. 2016). The concurrence is unable to cite to any court that eschews the clear language of *Birchfield's* central holding in favor of the unique interpretation it now embraces.

explained, "[t]he *Padley* court concluded that a driver's actual consent occurs after the driver has heard the Informing the Accused Form, weighed his or her options (including the refusal penalties), and decided whether to give or decline actual consent." *State v. Brar*, 2017 WI 73, ¶116, 376 Wis. 2d 685, 898 N.W.2d 499 (Abrahamson, J., dissenting).

¶103 That implied consent and actual consent are separate and distinct concepts is confirmed by an analysis of recent United States Supreme Court precedent in addition to *Birchfield*.[7] In *Missouri v. McNeely*, the Supreme Court determined that "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." 569 U.S. 141, 156 (2013). A case by case determination is the antithesis of a categorical exception. Although *McNeely* was an exigent circumstances case, the court's emphasis on the totality of the circumstances suggests broad application of the case by case determinations it requires. *Brar*, 376 Wis. 2d 685, ¶122 (Abrahamson, J., dissenting).

¶104 Indeed, the Supreme Court implied such a broad application of *McNeely* in *Aviles v. Texas*, 571 U.S. 1119 (2014). In *Aviles*, the Court vacated a Texas judgment upholding a warrantless blood draw based not on actual consent but on implied consent derived through the Texas implied consent law. 571 U.S. 1119 (2014). The Court

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[7] For further in-depth analysis of this assertion, *see State v. Brar*, 2017 WI 73, ¶¶119-126, 376 Wis. 2d 685, 898 N.W.2d 499 (Abrahamson, J., dissenting).

further remanded the *Aviles* case to the Texas court of appeals for further consideration in light of *McNeely*. *Id.*

¶105 "*Aviles* suggests that *McNeely* should be read broadly to apply to all warrantless blood draws and that the Texas implied consent statute was not a per se exception to the Fourth Amendment justifying warrantless blood draws." *Brar*, 376 Wis. 2d 685, ¶123 (Abrahamson, J., dissenting). On remand the Texas court of appeals concluded that the Texas implied consent statute "flies in the face of *McNeely's* repeated mandate that courts must consider the *totality* of the circumstances of each case." *Aviles v. State*, 443 S.W.3d 291, 294 (Tex. Ct. App. 2014).

¶106 The upshot of these United States Supreme Court cases is that reliance on an implied consent statute to provide actual consent to a Fourth Amendment search violates *McNeely's* requirement that each blood draw in a drunk driving case be analyzed on a case by case basis. The implied consent statute attempts to create a per se exception to the warrant requirement. Of course, categorical consent is by definition not individualized.

¶107 The lead opinion employs the simple act of driving an automobile as justification for a search. The untenability of the lead opinion's position is aptly illustrated by Justice Kelly's concurrence in *Brar*, 376 Wis. 2d 685, ¶¶59-66 (Kelly, J., concurring). As Justice Kelly explains, a court's normal constitutional inquiry into whether consent is given involves an examination of the totality of the circumstances and a determination

that the consent was voluntary and not mere acquiescence to authority. *Id.*, ¶¶59-62. On the other hand, "[f]or 'consent' implied by law, we ask whether the driver drove his car." *Id.*, ¶64.

¶108 Further, the lead opinion errs by relying not on a constitutionally well-recognized exception to the warrant requirement, but instead on a Wisconsin statute, to curtail constitutional protections. By seeking to create a *statutory*, per se consent exception to the warrant requirement, the lead opinion further steps into a minefield. *See* lead op., ¶¶53-55 (asserting that Mitchell "forfeited the statutory opportunity to withdraw the consent to search that he had given.").

¶109 A blood draw is plainly a "search" for Fourth Amendment purposes. *Birchfield*, 136 S. Ct. at 2185. Accordingly, one has a constitutional right, not merely a statutory right, to refuse such a search absent a warrant or an applicable exception.[8] *See State v. Dalton*, 2018 WI 85, ¶61, 383 Wis. 2d 147, 914 N.W.2d 120. Under the lead opinion's analysis, however, the opportunity to refuse an unconstitutional search is merely a matter of legislative grace. If the ability to withdraw consent is merely statutory, could the legislature remove the ability to withdraw consent

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[8] The lead opinion's reliance on *South Dakota v. Neville*, 459 U.S. 553, 560 n.10 (1983), is misplaced. *See* lead op., ¶¶38-39. *Neville* was decided pre-*McNeely* and pre-*Birchfield*. Both *McNeely* and *Birchfield* have had a significant effect on drunk driving law, and highlight the constitutional nature of a blood draw. Both cases analyze breath and blood tests as Fourth Amendment searches and appear to supersede the statement from the Fifth Amendment *Neville* case on which the lead opinion relies.

entirely? For the Fourth Amendment to have any meaning, such a result cannot stand.

¶110 I therefore conclude that implied consent is insufficient for purposes of a Fourth Amendment search. As the court of appeals explained in *Padley*, the implied consent law does not authorize searches. Rather, it authorizes law enforcement to require a driver to make a choice: provide actual consent and potentially give the state evidence that the driver committed a crime, or withdraw implied consent and thereby suffer the civil consequences of withdrawing consent. *Padley*, 354 Wis. 2d 545, ¶39.

¶111 A person who is unconscious cannot make this choice. Because he was unconscious Mitchell did not react to the Informing the Accused Form when law enforcement presented him with his options. He exhibited no "words, gestures, or conduct" that would indicate his actual consent to a blood draw. *See Artic*, 327 Wis. 2d 392, ¶30.

¶112 Because consent provided solely by way of an implied consent statute is not constitutionally sufficient, I determine that the results of Mitchell's blood draw must be suppressed. Accordingly, I respectfully dissent.

¶113 I am authorized to state that Justice SHIRLEY S. ABRAHAMSON joins this dissent.

WISCONSIN COURT OF APPEALS

DISTRICT II

Appeal No. 2015AP304-CR

Cir. Ct. No. 2013CF365

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GERALD P. MITCHELL,

DEFENDANT-APPELLANT.

FILED

MAY 17, 2017

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Pursuant to WIS. STAT. RULE 809.61, this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

This cases raises a single question: whether the warrantless blood draw of an unconscious motorist pursuant to Wisconsin's implied consent law, where no exigent circumstances exist or have been argued, violates the Fourth Amendment.

BACKGROUND

Gerald P. Mitchell was charged with operating a motor vehicle while intoxicated (OWI), and operating with a prohibited alcohol concentration (PAC).[1] He moved to suppress the results of a blood test taken while he was unconscious. The parties do not contest the basic facts on appeal.

Officer Alexander Jaeger was the sole witness at the suppression hearing. He testified that around 3:17 p.m. on May 30, 2013, he received a dispatch call to check on the welfare of a male subject in Sheboygan County. When he arrived, he spoke with the complainant, Alvin Swenson, who informed Jaeger that he knew Mitchell and "received a telephone call from ... Mitchell's mother concerned about his safety." Swenson told Jaeger that he went to his window shortly after the call and observed Mitchell in a discombobulated state. Mitchell was "very disoriented," and he "appeared [to be] intoxicated or under the influence, was stumbling, had thrown a bag of garbage into the backyard and had great difficulty maintaining balance, nearly falling several times before getting into a gray minivan and driving away."

Jaeger was able to locate Mitchell walking down St. Clair Avenue about one-half hour after speaking with Swenson. A gray van was also found nearby on Michigan Avenue. Mitchell's state was consistent with what Swenson described. Mitchell was not wearing a shirt, and was wet and covered in sand

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[1] Mitchell had six previous OWI convictions, which subjected him to enhanced penalties. *See* WIS. STAT. § 346.65(2)(am)6. (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

"similar to if you had gone swimming in the lake." Jaeger explained that Mitchell "was slurring his words" and "had great difficulty in maintaining balance," nearly falling over "several times," necessitating Jaeger and another officer to help him "to ensure he wouldn't fall."

Initially, Mitchell stated that he had been drinking "in his apartment." However, he later altered his story and informed Jaeger "that he was drinking down at the beach" and parked his vehicle "because he felt he was too drunk to drive." Jaeger further explained that Mitchell's current condition made administration of the standard field sobriety tests unsafe, so he declined to administer them. Jaeger did administer a preliminary breath test, which indicated an alcohol concentration of .24. Based on his observations, Jaeger arrested Mitchell for OWI at approximately 4:26 p.m.

On the way to the police station, Mitchell's condition began to decline, and he became more lethargic. Upon arriving at the station, Mitchell had to be helped out of the squad car. Jaeger concluded that a breath test would not be appropriate, and he took Mitchell from the station to the hospital for a blood test. The drive took approximately eight minutes. During the drive, Mitchell "appeared to be completely incapacitated, would not wake up with any type of stimulation, and had to be escorted into the hospital by wheelchair." Jaeger then read the "Informing the Accused form verbatim" to the inert Mitchell. Mitchell did not respond. Because of Mitchell's "unusual" level of incapacitation, obtaining affirmative verbal "consent" at that time was not possible. Jaeger admitted on cross-examination that he could have applied for a

warrant; he did not. Accordingly, at 5:59 p.m. a blood sample was taken, which revealed a blood alcohol concentration of .222g/100mL.[2]

Mitchell argued that the blood test should be suppressed because it was taken without a warrant or his consent. The State responded that Mitchell had consented to the blood draw via the "implied consent" provided for in WIS. STAT. § 343.305. The State explained that under § 343.305(3)(b), unconscious persons are presumed not to have withdrawn their consent, and therefore—because Mitchell was unconscious—the warrantless blood draw was pursuant to this (implied) consent.

The State expressly disclaimed that it was relying on exigent circumstances to justify the draw, explaining that "[t]here is nothing to suggest that this is a blood draw on [an] exigent circumstances situation when there has been a concern for exigency." The circuit court denied Mitchell's motion, reasoning that WIS. STAT. § 343.305(3)(b) "makes clear that an unconscious operator ... cannot withdraw their consent to a blood sample." The only remaining question, the court reasoned, was whether probable cause supported the blood draw, which it clearly did.

After a jury trial, Mitchell was convicted on both the OWI count and the PAC count. He was sentenced to three years of initial confinement and three years of extended supervision on each count to be served concurrently. Mitchell appeals from his convictions.

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[2] Although the specific results were not mentioned during the suppression hearing, Mitchell entered into a stipulation at trial that the results were .222g/100mL.

DISCUSSION

This case squarely asks whether the "implied consent" outlined in WIS. STAT. § 343.305(3)(b) constitutes consent to a search under the Fourth Amendment. Although no case has explicitly decided the precise issue of whether a warrantless blood draw on an unconscious motorist may be justified solely by "implied consent," our precedents do address whether statutory implied consent is actual consent. These cases offer differing answers to that question, and accordingly, we must certify. *See Marks v. Houston Cas. Co.*, 2016 WI 53, ¶¶78- 79, 369 Wis. 2d 547, 881 N.W.2d 309 (holding that the court of appeals should certify an issue where two of its cases conflict).

We certified this precise issue previously in *State v. Howes*, No. 2014AP1870-CR, unpublished certification (WI App Jan. 28, 2016). Although certification was granted, the lead opinion decided the case on the basis that exigent circumstances justified the search. *State v. Howes*, 2017 WI 18, ¶3, 373 Wis. 2d 468, __ N.W.2d. __. Justice Gableman, joined by Justice Ziegler, authored a concurrence explaining his view that implied consent constitutes actual consent. *Id.*, ¶¶52, 84 (Gableman, J., concurring). Justice Abrahamson authored a dissent that explained her view that implied consent did not constitute actual consent for Fourth Amendment purposes. *Id.*, ¶¶89, 136 (Abrahamson, J., dissenting). She was joined in this reasoning by Justice Ann Walsh Bradley and Justice Kelly. *Id.*, ¶154. With no controlling majority view, this question remains unanswered.

This case presents the opportunity to clarify the law head-on. While consent is not the only circumstance in which a warrantless search is permissible, none of the other "few" and "well-delineated" exceptions were argued, briefed, or otherwise addressed. *See State v. Faust*, 2004 WI 99, ¶11, 274 Wis. 2d 183, 682 N.W.2d 371 ("Subject to a few well-delineated exceptions, warrantless searches are deemed per se unreasonable under the Fourth Amendment."). In particular, this case is not susceptible to resolution on the ground of exigent circumstances. No testimony was received that would support the conclusion that exigent circumstances justified the warrantless blood draw. Jaeger expressed agnosticism as to how long it would have taken to obtain a warrant, and he never once testified (or even implied) that there was no time to get a warrant. The State, which bears the burden to prove that exigent circumstances existed and justified the warrantless intrusion, conceded that this exception is inapplicable below, and it does the same before us. The sole question, then, is whether Mitchell consented to the blood draw.

A. Legal Overview

The Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures. Under these provisions, "[w]arrantless searches are per se unreasonable, subject to several clearly delineated exceptions." *State v. Artic*, 2010 WI 83, ¶29, 327 Wis. 2d 392, 786 N.W.2d 430. Consent is one of these "clearly delineated exceptions." *Id.* Although consent may be given by "words, gestures, or conduct," it must be actual consent, which is a question of historical fact.

Id., ¶30. It is the State's burden to establish and prove by clear and convincing evidence that consent was voluntary. *Id.*, ¶32.

The United States Supreme Court has "referred approvingly of the general concept of implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016). But it has yet to decide whether the "implied consent" that flows from a statutory scheme constitutes actual Fourth Amendment consent. *See id.* at 2185. Some state courts have concluded that statutory implied consent satisfies the Fourth Amendment. *See, e.g., Bobeck v. Idaho Transp. Dep't*, 363 P.3d 861, 866-67 (Idaho Ct. App. 2015), *review denied* (Idaho Dec. 23, 2015). Others have reasoned that such implied consent is a legal fiction that does "not take into account the totality of the circumstances" as required by the United States Supreme Court, and therefore implied consent alone cannot justify a warrantless search. *See, e.g., Aviles v. State*, 443 S.W.3d 291, 294 (Tex. App. 2014) (citation omitted).

Wisconsin's implied consent law is contained in WIS. STAT. § 343.305. It provides as follows:

> Any person who ... drives or operates a motor vehicle upon the public highways of this state ... is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol ... when requested to do so by a law

> enforcement officer under sub. (3)(a) or (am) or when required to do so under sub. (3)(ar) or (b). Any such tests shall be administered upon the request of a law enforcement officer.

Sec. 343.305(2). Because Mitchell was unconscious, it is the "implied consent" to submit to a blood test "when required to do so" under para. (3)(b) that concerns us here.

Addressing unconscious motorists, WIS. STAT. § 343.305(3)(b) operates in a simple, straightforward manner. It provides the following:

> A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection, and if a law enforcement officer has probable cause to believe that the person has violated [WIS. STAT. §] 346.63(1) ... one or more samples specified in par. (a) or (am) may be administered to the person.

Id. Thus, by choosing to drive on public roads prior to losing consciousness, an unconscious person is "deemed to have given consent" to his or her blood being tested. That consent is "presumed" not to have been withdrawn. Accordingly, an officer may act on this "implied consent" and conduct a warrantless blood draw provided that the officer "has probable cause to believe" the unconscious person has violated WIS. STAT. § 346.63(1)—as Jaeger concededly did

here.

B. The Parties' Positions

The parties agree that WIS. STAT. § 343.305(3)(b) is the applicable provision at issue. Neither party contests that Jaeger had probable cause to believe Mitchell was guilty of OWI at the time of the blood draw. The parties disagree, however, about whether the blood draw was reasonable under the Fourth Amendment.

The State relies exclusively on Mitchell's "implied consent" to justify the warrantless blood draw. The State's position is simple: Mitchell consented to have his blood drawn when he drove on Wisconsin highways and never withdrew that consent. In the State's view, this "consent" passes constitutional muster.

Mitchell takes the position that statutory implied consent cannot operate as Fourth Amendment consent because he had "no opportunity to consent or to refuse consent." In his view, consent occurs when an officer reads the Informing the Accused, not when a person drives on Wisconsin roads. Because he was incapable of giving affirmative consent to the blood draw, he concludes that the blood draw cannot be justified under the consent exception.[3] Thus, though

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[3] Mitchell additionally urges that WIS. STAT. § 343.305(3)(b) should not apply where police have time to obtain a warrant. Because "the warrant process would not have significantly increased the delay before the blood test could be conducted," he maintains Jaeger was required to obtain a warrant. He grounds his argument in "public policy" and the Supreme Court's exigent circumstances analysis in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). However, because the State has conceded that the blood draw was not justified by exigent circumstances, this argument need not be addressed. The real issue is whether Mitchell

he does not quite frame it as such, his argument is in effect that the implied consent applying to unconscious individuals as described in WIS. STAT. § 343.305(3)(b) is unconstitutional—i.e., it cannot justify a warrantless blood draw.

C. Our Precedents Offer Conflicting Answers

Our certification in *Howes* explained in much greater detail the case law and constitutional background to this question. Having just considered *Howes*, the members of the court are well aware of the important questions and various arguments pro and con. Rather than retread and repeat the same ground, we briefly explain why we believe we are compelled to certify this question again. Namely, two of our own cases—*State v. Padley*, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867, and *State v. Wintlend*, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745—specifically addressed how the implied consent statute operates and whether it satisfies the consent exception, and both came to incompatible answers.

In *Padley*, it was undisputed that the defendant actually consented to having her blood drawn. *Padley*, 354 Wis. 2d 545, ¶11. At issue, was whether Padley's consent was voluntary. *Id*, ¶12. We rejected her argument that her consent was coerced, concluding that the implied consent statute offered Padley a choice between consenting to the blood draw or withdrawing her "implied consent" and facing the statutory penalties. *Id.*, ¶27. Although

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consented to the blood draw. If he did, the practicality of obtaining a warrant is immaterial; the search would be justified under the consent exception.

this choice was difficult, we concluded that it passed constitutional muster. *Id.* In our discussion, we explained the meaning of "implied consent" in a manner that affects this case.

> On occasion in the past we have seen the term "implied consent" used inappropriately to refer to the consent a driver gives to a blood draw at the time a law enforcement officer requires that driver to decide whether to give consent. However, actual consent to a blood draw is not "implied consent," but rather a possible result of requiring the driver to choose whether to consent under the implied consent law.
>
> There are two consent issues in play when an officer relies on the implied consent law. The first begins with the "implied consent" to a blood draw that all persons accept as a condition of being licensed to drive a vehicle on Wisconsin public road ways. The existence of this "implied consent" does not mean that police may require a driver to submit to a blood draw. Rather, it means that, in situations specified by the legislature, if a driver chooses not to consent to a blood draw (effectively declining to comply with the implied consent law), the driver may be penalized....

Id., ¶¶25-26. In other words, implied consent (at least in that scenario) was not actual consent, but a choice between two alternatives: consent or face statutory penalties.

We also took the time to "address some confusion in the arguments of the parties regarding the implied consent law." *Id.*, ¶37. Of particular note, we explicitly rejected the State's argument that "implied consent ... is still consent." *Id.* The contention that "'implied consent' alone can 'serve as a valid exception to the warrant requirement'" was, we stated, "incorrect." *Id.* We explained, "It is incorrect to say that a driver who consents to a blood draw ... has given 'implied consent.'" *Id.*, ¶38. Rather, in that circumstance "consent is *actual* consent, not *implied* consent." *Id.* (emphasis added). We further reasoned that "the implied consent law is explicitly designed to allow the driver, and not the police officer, to make the choice as to whether" to give consent. *Id*, ¶39. Said another way, implied consent is not really consent; it "does not authorize searches." *Id*, ¶40. Rather, it is a legal trigger that authorizes law enforcement to require a choice: actually consent or face sanctions. *Id*, ¶40. We acknowledged tension between this view of implied consent and the statute's clear statement that "implied consent is deemed the functional equivalent of actual consent" for unconscious drivers under certain circumstances. *Id.*, ¶39 n.10. However, we left resolution of that "tension" for another day. *Id.* Though the discussion in *Padley* was based on it's statutory application to conscious drivers, the case still sets forth two broad propositions of law: (1) consent is given (or "withdrawn") at the time the officer reads the Informing the Accused form, and (2)

"implied consent" does not by itself satisfy the consent exception.

Several years prior to *Padley*, we addressed the implied consent statute in *Wintlend*. In that case, we were faced with the same scenario as *Padley*: a motorist was stopped for OWI, was read the Informing the Accused warnings, and consented to a blood draw. *Wintlend*, 258 Wis. 2d 875, ¶2. As in *Padley*, Wintlend argued that although he consented to the blood draw, his consent was not voluntary.

Critical to whether Wintlend's consent was coerced was the question of the precise time "coercion rears its head." *Wintlend*, 258 Wis. 2d 875, ¶14. In other words, when did Wintlend consent for Fourth Amendment purposes? Wintlend maintained (like our later decision in *Padley*) that he consented at the time the officer read him the Informing the Accused warnings. *Id.* He further argued that his consent was coerced because he was forced to choose to either consent to a blood draw or face suspension of his license. *Id.* We rejected his arguments. Relying on *State v. Neitzel*, 95 Wis. 2d 191, 289 N.W.2d 828 (1980)—a case not addressing the consent exception or the Fourth Amendment— we reasoned that WIS. STAT. § 343.305 provides that "when a would-be motorist applies for and receives an operator's license, that person submits to the legislatively imposed condition that, upon being arrested for driving while under the influence, he or she co[illegible]nts to submit to the prescribed chemical tests." *Wintlend*, 258 Wis. 2d 875, ¶12.[4] Thus, for

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[4] Here too we conceded some tension. The conclusion that implied consent takes place when a person obtains his or her license does not sit comfortably with the plain language of WIS. STAT. § 343.305(2) that any person "who drives or operates a

Fourth Amendment purposes, "the time of consent is when a license is obtained," not when confronted with the Informing the Accused warnings. *Id.*, ¶¶12-14.

We further concluded that the implied consent given when a license is obtained is actual, Fourth Amendment consent, and that such consent is voluntary. *Id.*, ¶¶13-14. We explained:

> [I]t stands to reason that any would-be motorist applying for a motor vehicle license is not coerced, at that point in time, into making the decision to get a license conditioned on the promise that if arrested for drunk driving, the motorist agrees to take a test or lose the license.

Id., ¶13. Because there was no unconstitutional coercion, we concluded that Wintlend's implied consent—which he gave as a condition of receiving a license—satisfied the consent exception. *Id.*, ¶¶1, 19. Again, two critical points of reasoning emerge, both contrary to *Padley*'s reasoning. First, the consent that matters for Fourth Amendment purposes takes place when a motorist obtains his or her license, and second, this statutory "implied consent" is sufficient to satisfy the consent exception to the Fourth Amendment.

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motor vehicle upon the public highways ... is deemed to have given consent." *State v. Wintlend*, 2002 WI App 314, ¶15, 258 Wis. 2d 875, 655 N.W.2d 745. But we concluded that we were bound by our interpretation of *State v. Neitzel*, 95 Wis. 2d 191, 289 N.W.2d 828 (1980). *Wintlend*, 258 Wis. 2d 875, ¶14.

Like *Wintlend* and *Padley*, the issue here is whether the "implied consent" that is statutorily deemed to have occurred when a driver chooses to drive on a public road supplies voluntary consent to a blood draw for Fourth Amendment purposes under the conditions set forth in the law. Because Mitchell was unconscious at the time of the blood draw, the only possible way to conclude he consented is to hold that "implied consent" under WIS. STAT. § 343.305 is actual, Fourth Amendment consent. On this question, *Wintlend* and *Padley* offer, or at least strongly suggest, two different answers. *Wintlend* implies that the "implied consent" provided for in WIS. STAT. § 343.305 is actual, voluntary consent, at least so long as the suspect does not withdraw that consent. *Padley*, on the other hand, explicitly rejected that position when it was offered by the State. The cases also disagree about when consent is given—an issue critical to whether consent is in fact given and voluntary. Neither case directly addressed our precise factual issue, but we cannot resolve this case without ignoring or modifying the differing analyses in *Padley* and *Wintlend*.

Wintlend predates *Padley* and might arguably govern. *See Marks*, 369 Wis. 2d 547, ¶78. But as we are unable to resolve conflicts in precedent, the proper course of action in this situation is to certify the question. *Id.*, ¶79 (holding that the court of appeals may not "overrule, modify, or withdraw language from a previously published decision" and a court of appeals decision "that a case impermissibly modified an earlier case and is thus not binding is effectively the same as overruling that case"). We ask the Wisconsin Supreme Court to accept certification and provide clear guidance to the

bench, the bar, and the public.

State of Wisconsin
Circuit Court
Sheboygan County

State of Wisconsin,
Plaintiff,

v.

Gerald P. Mitchell,
Defendant.

Case No. 13 CF 365

Before the Honorable Terence T. Bourke
July 17, 2013

Transcript of Preliminary Hearing and Arraignment [EXCERPT]

* * *

[3] ATTORNEY HABERMAN: Thank you, Your Honor. State will call Alex Jaeger.

**** *OFFICER ALEX JAEGER,* ****

called as a witness, having been first duly sworn,

was examined and testified as follows:

COURT CLERK: State your name and spell your last name.

THE WITNESS: Officer Alex Jaeger, J-A-E-G-E-R.

THE COURT: Go ahead please.

DIRECT EXAMINATION

BY ATTORNEY HABERMAN:

Q Mr. Jaeger, how are you employed, sir?

[4] **A** City of Sheboygan police officer.

Q How long have you been a police officer for?

A With the City for just over four years.

Q And prior to that you were with the Sheboygan Sheriff's Department; is that correct?

A Yes, for about just under three years.

Q Total of about seven years in law enforcement?

A Yes.

Q Directing your attention to May 30, 2013, were you working at approximately 3:17 p.m.?

A Yes I was.

Q And in fact, were you dispatched to 1127 North Eighth Street in the city of Sheboygan, Sheboygan County, Wisconsin?

A Yes I was.

Q Do you know what kind of residence that is?

A It's a temporary living, transitional living facility.

Q Okay. And who did you make contact with there?

A I spoke to Alvin Swenson, who was reporting to me, or who was the complainant.

Q And what did Alvin report to you about why officers would have been called?

ATTORNEY WINGROVE: I'm going to object. This is going to call for hearsay as to Mr. Swenson's **[5]** opinion about something. And, of course, the issue's going to be there's no foundation to support his opinion.

THE COURT: Well, I note your objection, but I'll let the officer testify.

THE WITNESS: Can you repeat the question?

BY ATTORNEY HABERMAN:

Q Sure. What did Mr. Swenson report to you?

A He was concerned about the defendant's current status. He told me he had received a call from relatives of the defendant that he had made some suicidal statements. Mr. Swenson said that he had previously resided with the defendant within a matter of just days I believe, and the defendant had moved out to an apartment sort of across the alley from where he was currently living.

And he said that he had seen Mr. Mitchell after receiving that phone call. He looked out his window, saw Mr. Mitchell carrying a bag of garbage and throwing the bag of garbage into the backyard and having some stability and balance issues as well.

Q Let me just stop you there, Officer. You made a couple references there to a person by the name of **[6]**

Mr. Mitchell and the defendant. Did you ultimately have contact as part of your investigation with a person by the name of Gerald Mitchell?

A Yes I did.

Q Do you see that person in court today?

A Yes I do.

Q Can you identify him by what he's wearing and where he's seated?

A He's wearing a red jumpsuit sitting at the defendant's table.

ATTORNEY HABERMAN: Your Honor, let the record reflect

ATTORNEY WINGROVE: I will stipulate to the same. It's pretty obvious.

ATTORNEY HABERMAN: Thank you.

THE COURT: All right. The record shall reflect Mr. Mitchell's identification.

BY ATTORNEY HABERMAN:

Q And when, Officer, you were referencing the defendant about statements made by Alvin, was he talking about Mr. Mitchell?

A Yes.

Q Okay. What did Alvin indicate to you that Mr. Mitchell was doing outside after he got rid of that garbage?

[7] A He Stumbled in his words stumbled in and appeared to be highly intoxicated from the window that he could see him down there, and he got into a gray van.

Q And did -

ATTORNEY WINGROVE: Just for the record I'm going to renew the objection as to the opinion evidenced by Alvin Swenson. I don't know who this guy is. I don't know what his basis for deciding anyone was intoxicated was.

THE COURT: That's argument. I'm okay with the argument. But hearsay is admissible, and I don't have a problem with the officer testifying to what Mr. Swenson told him.

BY ATTORNEY HABERMAN:

Q Did Mr. Swenson indicate whether or not the defendant left the residence in his van?

A Yes. As the driver.

Q And did you have an opportunity to speak to the defendant's mother, Carol?

A Yes.

Q And why -- how is it that you came to Carol's residence? And I just want to be a brief statement is all I'm looking for just to explain the chronology of how you ended up there.

[8] A I merely spoke to her over the telephone.

Q And why is it that you spoke to her?

A She was the registered owner of the van that he would have left in.

Q And did Carol say anything to you about the defendant using the van?

A She was not aware he was using it and that he was intoxicated.

Q Did she make any statements about him being

in possession of her van?

A I don't recall specifically.

Q When you referenced the gray van that was described by Mr. Swenson, were you able to receive any sort of license plate or anything like that?

A Yes.

Q How is it that you received that?

A Through his mother, who's the registered owner, and checking previous records and DOT records through the computer in the squad.

Q And you said his mother, so that would be the defendant's mother?

A That's what I believe, yes.

Q Ultimately where did you locate the defendant?

A The defendant was walking back towards his residence from further north on North Eighth **[9]** Street. Apparently he had been following or causing some type of a commotion that one of our community service officers had located him near the funeral home just about a half block north of us.

Q And what, if any, observations did you make about the defendant that day?

A The defendant appeared to be intoxicated. He had great difficulty in maintaining his balance. He was nearly stumbling. I had to put my arms out to grab onto him at one point to keep him from stumbling. As we were standing still he would kind of walk backwards a bit in an attempt to keep his balance. And I noted that his clothing was wet and covered in sand.

Q Did the defendant make any statements about

where the van was?

A He said he parked it by the beach.

Q Did he say why?

A He said he was too drunk to drive.

Q And did the defendant make any other statements about drinking?

A He initially told me that he was drinking in his apartment and that he was not drinking down at the beach. However, he would change his story and go back and forth on that.

[10] Q And were you able to identify what -- where his apartment was at this point?

A Yes.

Q What was that?

A 721 St. Clair Avenue, Number 4, I believe. It would have been directly across the alley.

Q Are you sure that it was 721?

A Not specifically, no. I just believed it was somewhere in the 700 block of St. Clair Avenue.

Q And would that be consistent with the description provided by Mr. Swenson as to his ability to see the nearby residence?

A Yes.

Q Was this vehicle or van located?

A Yes.

Q By who?

A Officer Stephen.

Q And what did he tell you, if anything, about

that van?

A It was parked on the side of the road, and there appeared to be some fresh scratches and damage to the driver's side mirror area.

Q Did that van have the same Wisconsin registration as the van registered to the defendant's mother?

A Yes.

[11] Q Did that match the description of the van that was provided by Mr. Swenson?

A Yes.

Q In your contact with the defendant occurred roughly how long after your -- the original complaint you took from Mr. Swenson?

A I believe it was, like, a half hour, 45 minutes maybe.

Q Okay. When you had contact with the defendant did you put him through any field sobriety tests?

A No.

Q Why is that?

A He was quite hostile towards officers. Based on the fact that we had gotten information that he was suicidal and things like that, I conducted a frisk of his person for weapons for my safety and his. I noted that his clothing was wet. And as I continued my search I -- the defendant objected and kind of spun around on me, you know, hey, you can't do that, you know. He was very -- not just objecting to a search or a frisk of his person but he was quite belligerent, boisterous, and not very compliant.

Q And was he ultimately placed into a squad car?

A Yes.

[12] Q By who?

A Me.

Q And were you able to do it alone?

A What's that?

Q Were you able to do that alone?

ATTORNEY WINGROVE: I'm going to object as to relevancy.

ATTORNEY HABERMAN: Judge, I think there would be some relevance by -- if I can have a little leeway on a couple questions here.

THE COURT: If where you're going is that the officer needed somebody's help because Mr. Mitchell was unstable, I think that's relevant because it relates to the felony he's charged with. If you're asking about help because he's being uncooperative, that doesn't really relate to the felony he's being charged with.

ATTORNEY HABERMAN: I would anticipate, although I don't know what the officer would testify next to, but I would anticipate that he would testify that based upon the level of intoxication he needed help to get the person in the vehicle.

THE COURT: If you want to ask the officer that question go ahead.

[13] BY ATTORNEY HABERMAN:

Q Officer, why did two officers have to put the defendant in the squad car?

A Because of his instability and his behavior.

Q Okay.

ATTORNEY WINGROVE: I would ask the answer then be stricken because it's just a mess in terms of what the Court directed.

THE COURT: I'll let the answer stand.

ATTORNEY WINGROVE: I'm sorry?

THE COURT: I'll let the answer stand.

ATTORNEY WINGROVE: Thank you.

BY ATTORNEY HABERMAN:

Q After the defendant was placed in the squad car what happened next?

A I drove him to the Police Department.

Q And at the Police Department what happened next?

A He became, I guess for -- he was so intoxicated or under the influence of something or having some type of a medical concern that he could no longer stand. He was slouching down in his chair almost becoming unresponsive.

And because I was going to be at the Police Department continuing my OWI investigation, I made contact with supervision who also noted his **[14]** behavior and current condition and was asked just to bring him up to the hospital rather than deal with him in our booking area.

Q And which, if any, hospital did you go to?

A Memorial Hospital in the city of Sheboygan.

Q And while at Sheboygan Memorial Hospital did you have the opportunity to read the Informing the Accused to the defendant?

A I did. However, he was unconscious at that point.

Q And ultimately as a result of his unconsciousness was he able to respond or give you any sort of indication?

A He did not.

Q And was a blood draw then conducted of the defendant?

A Yes.

Q I'm not sure if I covered this so I want to make sure I do. Did you notice any sort of glassy eyes, slurred speech, or an odor of intoxicants, all of which would be things we might typically see in this scenario?

A I noticed each of the identifiers you described.

Q And was that -- those observations throughout your entire contact with the defendant?

A For the most part. Once -- when I actually started **[15]** getting him up to the hospital and pulling in the parking lot, I noticed that he was now slumped over in the back seat of the car completely unresponsive, refused to answer or could not answer any type of questioning or stimulation to get him to talk to me.

At that point he was loaded into a wheelchair with the assistance of another officer, and we brought him in basically incapacitated and unconscious, and he remained in that condition throughout the rest of my time there.

Q And ultimately are you aware if the blood draw that was conducted was sent to the State Laboratory

of Hygiene?

A Yes.

Q And did you receive a report from that?

A Yes I did.

Q Okay.

ATTORNEY HABERMAN: Your Honor, I am going to have at this time Exhibit 1 marked.

BY ATTORNEY HABERMAN:

Q Officer, I'm showing you Exhibit 1. Do you recognize this?

A Yes I do.

Q What is it?

[16] A It's a laboratory report from the Wisconsin State Lab of Hygiene.

Q Is this the laboratory report you received in this case?

A Yes it is.

ATTORNEY HABERMAN: Thank you. Your Honor, I would move for the admission of that Exhibit Number 1. I would also move for the admission of Exhibit 2, which I have now had marked with your clerk. Exhibit 2 is a certified driving record.

THE COURT: All right. Mr. Wingrove, have you seen Exhibit 1 and 2?

ATTORNEY WINGROVE: Yeah. I'll make objections to 1 as a foundation of hearsay; 2 I can't object to.

THE COURT: All right. I'll accept 1. It is a hearsay document, but it's a preliminary hearing, so

I'll accept it.

Any other questions for Officer Jaeger?

ATTORNEY HABERMAN: No.

THE COURT: And Mr. Wingrove.

ATTORNEY WINGROVE: Thank you.

CROSS-EXAMINATION

BY ATTORNEY WINGROVE:

Before court today I notice you were reviewing some [17] document; is that correct?

A Yes.

Q Would that have been a nine-page police report dated 6-28-13, incident number C1310171?

A I believe so, yes.

Q Do you have that document handy? Could you take a look at it?

A I don't have it with me. It's at the --

ATTORNEY HABERMAN: Your Honor, I do have it. He left it at the table with me. I'll show it to Attorney Wingrove.

ATTORNEY WINGROVE: Would you show it to the witness please? Thank you.

THE COURT: I like team work.

ATTORNEY HABERMAN: Your Honor, let the record reflect that I did provide Officer Jaeger's report to him at the request of Attorney Wingrove.

ATTORNEY WINGROVE: And I'll try to repeat the question. Forgive me if I don't do it quite accurately.

BY ATTORNEY WINGROVE:

Q Before court today I noticed you reviewing a document. Was that a nine-page report by the Sheboygan Police Department dated 6-28-13 referencing incident number C13-10171?

[18] A Yes it is.

Q Now, as a police officer you've received some training in how to respond to calls concerning people with-mental illness?

A Some, yes.

Q If someone's suffering from -- if someone's suicidal is it possible they're suffering from depression?

A It's possible.

Q Could be, yeah. And does depression sometimes affect people's movements and gait, the way they walk, the way they act?

A Maybe the way they walk. I'm not sure on the others.

Q Okay.

A Or I'm sorry, the way they act. Not the others.

Q And at some time during this incident you said there was some medical concerns?

A Yeah. I mean, I wasn't so concerned of medical concerns at the time that I first came into contact. But once I was transporting him to the hospital then his condition increasingly became worse.

Q Sure. And did you ever at any time believe that this was a suicide attempt?

[19] A I did not know at that time.

Q Okay. Were you concerned about it 'cuz after all that's why you were called out.

A It was a concern, yes.

Q Okay. Now, apparently you didn't receive the phone call. Dispatch received the phone call from Swenson?

A Correct.

Q Okay. And about how long did it take you to get to 723 St. Clair?

A I'm not exactly sure.

Q Take a stab at it please.

A There's various parts of the city that I could be coming from. I don't remember where I responded from.

Q Okay. So it might have been five minutes. It might have been ten minutes. It might have been twenty minutes?

A Probably five to ten tops I would think.

Q Okay. And you spoke to Swenson. And then about half hour, 45 minutes later you became aware of someone that was subsequently identified as the defendant at Eighth and St. Clair, right?

A Yes.

Q Okay. And how -- and actually just before you saw [20] him you said that he was walking back from further north towards Eighth, right?

A Just north of our location, yes.

Q Okay. How far away is that from the defendant's apartment?

A About a half block I think 'cuz it was the -- I believe it was the alley just north of the funeral home that's right there. Eighth and St. Clair is where he was observed by our community service officer.

Q When you say the alley just north of the funeral home, could you please tell me which quadrant is it in? Is that, like, the northwest, southwest? What corner of Eighth and St. Clair?

A It would be the northeast corner.

Q The northeast corner. And this is on Eighth, right?

A Right.

Q Okay. So that would be about a half block from the defendant's apartment, correct?

A About a half block.

Q Okay. Now I'm going to read you something and it's -- I'm going to page 3 of the incident report. Starting at the bottom of the page, last sentence. (As read) "I asked Gerald where his van **[21]** was, comma, and he told me, quotations, I parked it by the lake, period. I figured I was too drunk to drive, period, quotation mark. I asked if he had been drinking down at the lake or if he had been drinking intoxicants after he left his apartment, comma, and he replied twice, comma, paren, no, period, closed paren. He admitted to me he had been drinking intoxicants in his apartment, comma, but would not tell me who he was drinking with."

And then going a little bit further down. "It was here that I continued to further conversation with Gerald and he admitted to me that he had, comma, in fact, comma, consumed approximately four shots of

vodka while down at the beach, period."

Now, does that accurately state what's in your report?

A Yes.

Q Does your report actually state the questions you asked Gerald and his answers?

A What do you mean? If you're asking if my report is accurate, yes.

Q Okay. That's what I'm asking. So did you ask him if he was drinking alcohol by the lake after he left his apartment, right?

[22] A Yes.

Q Did you ask him if he went back to his apartment after he left the lake?

A No.

Q So for all you know as you sit here today he drove down to the lake, parked his van, had something to drink, walked back to his apartment, drank some in his apartment, and then went for another walk, and was walking around somewhere north of Eighth Street when you became aware of him?

ATTORNEY HABERMAN: Judge, I'm going to object. I think that's a nice closing argument that he can make at a jury trial, but at today's hearing we have a preliminary hearing with just probable cause. There are some inferences that would support his argument but also another argument.

ATTORNEY WINGROVE: I guess the purpose of a probable cause is for the State to adduce evidence to tell a plausible story that a felony had been

committed. Now --

THE COURT: I don't have a problem if the officer answers the question.

THE WITNESS: Can you ask the question again?

ATTORNEY WINGROVE: Okay.

[23] BY ATTORNEY WINGROVE:

Q For all you know -- I'll break it down. So Gerald told you he drove down to the lake and he had a couple of drinks, right?

A Yes.

Q He told you he parked his van because he figured he shouldn't drive, correct?

A Correct.

Q He then -- we know that he left the lake and presumably walked back, correct?

A I assume so.

Q And we don't know whether he went to his apartment or not, do we?

A I was at the apartment knocking on the door there looking to have him come to the door to see if he was inside at all.

Q Do you know whether he was in there or not?

A I don't. Nobody came to the door.

Q You know he doesn't like police officers apparently, correct?

A I don't know that.

Q You said he was really hostile when you went to talk to him. He didn't like the officers.

A Okay.

Q So you don't know whether he was in there or not, [24] do you?

A No.

Q And if he had something to drink in his apartment that could have been at that time, correct?

A I think that's plausible.

Q Yeah. Half hour's a lot of time, 45 minutes. And then you became aware of the community service officer became aware he was somewhere north of the apartment, correct?

A Yes.

Q And just so I'm clear. On follow-up investigation did you ever have reason to believe this was a suicide attempt?

A Through my conversation with Mobile Crisis they said they had made a visit to him while he was up in the ICU at the hospital and that there wasn't any other sanctions in place regarding his behaviors.

Q What does that mean?

A It means that it didn't seem that there was a suicide attempt from my standpoint. And in talking with Mobile Crisis they appeared to feel the same.

Q And just so we're clear the defendant was unresponsive when you read him his Informing the Accused, right?

[25] A Yes.

Q Was that before or after the blood draw?

A It was before the blood draw.

Q Let's talk about the van for a minute, okay? That was recovered in the 300 block of Michigan, correct?

A I believe so. That's what I was told.

Q And that's pretty close to the lakeshore, isn't it?

A Yes.

Q As a hypothetical -- and perhaps the State is going to object -- if someone said they went to the Slovenfest last weekend and they saw a car parked and they parked their car in the 300 block of Michigan to go to the festival, would that surprise you? Would that seem odd? Or the way things typically happen?

A You're asking if somebody was going to the beech if they would park their car in the 300 block of Michigan Avenue? Is that what you're asking?

Q Yeah. Does that often happen?

A That happens.

Q Did you record your interview with the defendant initially?

ATTORNEY HABERMAN: Objection, Judge. That's irrelevant.

[26] THE COURT: I'll sustain the objection.

ATTORNEY WINGROVE: No further questions.

* * *

State of Wisconsin
Circuit Court
Sheboygan County

State of Wisconsin,
Plaintiff,

v.

Gerald P. Mitchell,
Defendant.

Case No. 13 CF 365

Before the Honorable Terence T. Bourke
October 16, 2013

Transcript of Proceedings

* * *

[3] THE COURT: This is case number 13 CF 365, State versus Gerald Mitchell. He's here with Attorney Charles Wingrove. Nathan Haberman is here for the State.

This is a motion challenging the blood draw. And

Mr. Wingrove, apparently you just handed me something. Does this relate to this motion?

ATTORNEY WINGROVE: Yes it does, Your Honor. When I had first appeared with Mr. Mitchell and advised the Court we were going to bring a suppression motion, I also advised the Court that relying on DHS 92 and 42 CFR part two, we were going to argue that the proper procedure is to disclose the information from the hospital, those records, hasn't been followed, and that becomes another reason for suppression.

THE COURT: So it really has nothing to do with the facts behind the motion.

ATTORNEY WINGROVE: It's -- I hope to develop a very few facts at the hearing in support of it. And it's just another way of addressing the issue of they should have got a warrant for the blood draw.

THE COURT: All right. Mr. Haberman, go ahead.

ATTORNEY HABERMAN: Thank you, Your Honor. The State would call Officer Alexander Jaeger.

[4] ** *OFFICER ALEXANDER JAEGER,* **

called as a witness, having been first duly sworn, was examined and testified as follows:

COURT CLERK: State your name and spell your last name.

THE WITNESS: Officer Alex Jaeger,

J-A-E-G-E-R.

THE COURT: Go ahead please.

DIRECT EXAMINATION

BY ATTORNEY HABERMAN:

Q Mr. Jaeger, how are you employed, sir?

A City of Sheboygan police officer.

Q And how long have you been a police officer for with the City of Sheboygan?

A At the City about five years.

Q Do you have any other law enforcement experience beyond the City?

A I have approximately three years prior with the Sheboygan County Sheriff's Department as a patrol deputy.

Q So is that about eight years in total?

A Yes.

Q And in your eight years of law enforcement experience have you conducted investigations regarding people who are intoxicated due to the [5] consumption of alcohol or other drugs?

A Yes.

Q And what is your training regarding that?

A State certification in the administration of standardized field sobriety tests.

Q And have you in your training received the certification using the National Highway Transportation Safety Administration standard?

A Yes.

Q And as part of your law enforcement career about how many investigations have you been involved in that surround an OWI?

A Involved in? I would say well over two hundred.

Q And are you trained to use the preliminary breath test?

A Yes.

Q Directing your attention to May 30, 2013, at about 3:17 p.m. did you receive a dispatch?

A Yes I did.

Q And you were working at this time as a law enforcement officer?

A Yes.

Q And what was the dispatch in regards to?

A Check welfare complaint.

Q And where were you supposed to go?

[6] A An address on North 7th Street near - correction -- North Eighth Street near St. Clair Avenue. I don't recall the specific address number.

Q In any event that's in the city of Sheboygan, county of Sheboygan, state of Wisconsin?

A Yes.

Q And what information were you provided with prior to arriving there?

A Check welfare complaint, checking the welfare of a male subject.

Q Were you given a name?

A I don't recall if I was specifically given a name at that time.

Q And when you arrived at that location near North Eighth Street and St. Clair, who did you speak to, if anyone?

A I spoke with the complainant, Alvin Swenson.

Q What did Alvin indicate to you about the person's welfare?

A Alvin indicated that he had received a telephone call from Gerald Mitchell's mother concerned about his safety as he had made a statement about his personal well-being to her. Alvin further went on to tell me that he shortly thereafter went to his [7] window and observed Mr. Swenson -- I'm sorry -- observed Mr. Mitchell exiting the apartment behind where he lives, and he appeared to be very disoriented.

Q Did Alvin describe the nature of his relationship or familiarity with Mr. Mitchell?

A Yes. He said the two had recently resided together.

Q And what did Alvin describe about what he observed involving Mr. Mitchell's activities?

A He said that Mr. Mitchell had in his words appeared intoxicated or under the influence, was stumbling, had thrown a bag of garbage into the backyard and had great difficulty in maintaining balance, nearly falling several times before getting into a gray minivan and driving away.

Q And --

ATTORNEY WINGROVE: I'm going to object. I understand this is for a probable cause determination, so I'm assuming it's not being offered for the truth of the matter asserted, just that's what Mr. Swenson said.

ATTORNEY HABERMAN: Well, Judge, even if it is offered for the truth of the matter, hearsay doesn't apply at this kind of motion hearing. It is a

motion under 901.04, and it's a question concerning the admissibility of evidence.

[8] So the Court is not bound by the rules of evidence, and that would include hearsay.

THE COURT: I got to say you two are both talking over my head. Start again, Mr. Wingrove.

ATTORNEY WINGROVE: I was assuming that the testimony's being offered for the purposes of establishing probable cause.

THE COURT: That's correct.

ATTORNEY WINGROVE: Then I was going to make a point that it shouldn't be received for the truth of the matter asserted. This step of the hearing, as I see it, is about whether the officer developed enough facts to get probable cause to arrest the defendant.

THE COURT: No. I agree with that. What's your objection to that, Mr. Haberman?

ATTORNEY HABERMAN: Your Honor, I think it can be offered for the truth of the matter and, that is, did Alvin say that and did Alvin see that. And the reason it can be offered for that is because the hearsay rule doesn't apply at this type of hearing because it's a question concerning the admissibility of evidence.

THE COURT: Right. But I can't make a finding that Mr. Mitchell's drunk because of what Alvin Swenson said.

ATTORNEY HABERMAN: It's not going to be the [9] only fact, but it could be a factor.

THE COURT: I know. I think you two are talking

about different issues.

ATTORNEY HABERMAN: Okay.

BY ATTORNEY HABERMAN:

Q Officer, after you received that information from Mr. Swenson, were you able to communicate with other law enforcement officers and locate Mr. Mitchell?

A Yes.

Q And tell me about how soon after your conversation with Mr. Swenson did you locate Mr. Mitchell?

A Approximately a half hour.

Q And describe how you came in contact with Mr. Mitchell.

A As I was outside in my squad, a community service officer who works for the Police Department was also in the area and had located a male subject matching the physical description that I had provided out to other officers walking towards us about a block, half a block away. He appeared intoxicated and was possibly bothering a female pedestrian.

Q And before -- I should have asked this question before we went to that one. Before you located **[10]** Mr. Mitchell did you have contact with his mother, Carol Mitchell?

A Yes.

Q And what was the nature of that contact?

A I was concerned about the statement that Mr. Swenson had said. He had told me that his mother had called him concerned about a conversation she had with Mr. Mitchell over the phone. He made some

vague statements about potentially harming himself, and she was concerned about that. And I also needed to obtain the vehicle information that she had -- I learned she had actually owned the van that Mr. Mitchell had driven away in, and she provided me a license plate.

Q So the information that Ms. Mitchell provided you regarding a van that Mr. Mitchell drives, was that consistent, inconsistent, or something else with the information you received from Mr. Swenson about the van he observed the defendant get -- or Mr. Mitchell get into?

ATTORNEY WINGROVE: I'm going to object. That sounds like we're having one witness, one hearsay witness testify as to the credibility of another hearsay witness.

[11] THE COURT: I didn't take it that way.

ATTORNEY WINGROVE: You're the judge.

THE COURT: Well, it's corroborating evidence. We're talking about the officer's state of mind for probable cause. I don't have any problem overruling your objection. So go ahead.

BY ATTORNEY HABERMAN:

Q Do you need me to ask that question again, Officer Jaeger, or do you understand that?

A Please ask again.

Q The description of the van that was provided by Ms. Mitchell, did that match, was that -- I'm sorry -- was that consistent, inconsistent, or something else with the description of the van that Mr. Swenson provided you?

A It was consistent, a gray van.

Q Okay. When you had contact with Mr. Mitchell, what did you notice about his demeanor?

A He was slurring his words, stumbling. He was wearing jeans but no shirt, was wet, and he had a large amount of sand on his body similar to if you had gone swimming in the lake.

Q Did the observations you made of Mr. Mitchell provide any indication to you about intoxication?

A Yes.

[12] Q Describe that.

A He was slurring his words. He had great difficulty in maintaining balance, nearly fell several times to the point where another officer and myself had to extend our arms out to ensure he wouldn't fall. When the transition when I actually brought him across the street to the sidewalk area so we were out of traffic, he nearly fell after stepping up and over the curb. And he admitted actually that he had been drinking.

Q Do you see Mr. Mitchell in court today?

A Yes I do.

Q Can you describe him for the Court by what he's wearing and where he's seated please?

A Red jumpsuit at the defendant's table.

ATTORNEY HABERMAN: Your Honor, let the record reflect identification please.

ATTORNEY WINGROVE: We'll stipulate for today's purposes.

THE COURT: All right. Thank you.

BY ATTORNEY HABERMAN:

Q And Officer, you indicated the defendant made some statements about drinking. Describe that for us. What did he say?

A He admitted initially that he had been drinking. He was drinking in his apartment. And would not tell me if **[13]** he was drinking with anyone or who anyone -- who it would be that he was drinking with. And he said that he had been drinking just prior to our contact.

Q And as a result of his drinking what, if anything, did he say about the specific items he was drinking or numbers of drinks?

A He had later changed his story that he was drinking down at the beach, that he parked his car on Michigan Avenue because he felt he was too drunk to drive, and that he had four shots of vodka.

Q At that point had you received any information about any prior convictions for the defendant regarding operating while intoxicated?

A I don't recall if it was at that point or after.

Q At some point you received information about that.

A Yes.

Q Did the information about prior convictions factor into your decision on arresting him at all?

A Yes.

Q Correct me if I'm wrong, does that mean you received the information prior to the arrest?

A Yes.

Q Okay. Do you know -- if it wasn't at that moment, **[14]** do you know when it would have happened?

A Not specifically, no.

Q Did you have any other officer check for the gray van?

A Yes.

Q And was the gray van ever located?

A Yes it was.

Q Describe who did what.

A Officer Stephen had located the van parked on Michigan Avenue. I believe it was in the 300 block.

Q Were you provided any information about whether or not there was any damage to that vehicle?

A He indicated -- Officer Stephen did -- that there was some minor damage that appeared to be fresh I believe to the side mirror area.

Q And were you able to confirm that this is the same van that was discussed by Ms. Mitchell earlier?

A Yes. And that was by vehicle registration.

Q Okay. Did you have the defendant submit to any standardized field sobriety tests?

A No.

Q Why is that?

A Based on his current condition he was stumbling, could barely stand without being held, and I didn't **[15]** feel it would be safe for him to perform those tests.

Q Did you have any preliminary breath test

performed?

A Yes.

Q When -- at what point was that done?

A Just prior to the arrest.

Q And would that have been then on the street where you had initial contact with him?

A He was actually brought over to the front of my squad car where I performed the test. Or administered the breath test.

Q I'm not sure if we established this earlier, but where in -- where did you have the contact with him?

A It was on St. Clair Avenue just east of the intersection of Eighth Street and St. Clair Avenue.

Q And that's, again, in the city of Sheboygan, Sheboygan County, Wisconsin.

A Yes.

Q And if someone were to walk from the lake to the location where Mr. Swenson described seeing Mr. Mitchell, would they have to go through the location that you guys were in?

A I'm sorry, can you repeat the question?

Q Sure. If someone's in Sheboygan -- you're familiar **[16]** with the city?

A Yes.

Q In Sheboygan if someone's down by the lake, near Michigan Avenue and the lake, if they want to get back to the area where Mr. Swenson described initially seeing Mr. Mitchell, and you said that Mr. Swenson was near Eighth and St. Clair looking out a window when he saw Mr. Mitchell would they have

to walk through the location where you currently are having contact with Mr. Mitchell to get there?

A Potentially. I mean, we were probably 30, 40 feet west of his residence where he actually was on the Eighth Street side, and the lake would be from his residence to the east, and he lives 700 block of St. Clair Avenue.

Q Okay. When you administered the preliminary breath test what was the result?

A .24.

Q As a result of the arrest and your observations -- as a result of the preliminary breath test and your observations of the defendant as well as his statements, what did you do?

A Make an arrest for operating while intoxicated.

Q And what, if anything, did you do next?

[17] A He was placed in the back seat of my patrol vehicle, and I brought him to police headquarters for further processing.

Q Where is police headquarters?

A North 23rd Street in the city of Sheboygan.

Q And about how long generally would it take you to get from where you initially had this contact with Mr. Mitchell to the time you got to the Police Department?

A About five minutes maybe.

Q And what, if anything, did you notice about the defendant's condition during this time?

A It was declining.

Q What do you mean by that?

A He was becoming more lethargic in his movements, had greater difficulty in maintaining balance, had to be physically helped out of the squad car when we got there. And once he was in a holding cell with his handcuffs removed, he began to close his eyes and sort of fall asleep or perhaps pass out. But he would wake up with stimulation. And based on that condition, I didn't feel that a breath test would be appropriate. After talking to my lieutenant, we decided that a blood test would be more appropriate, and I brought him to Memorial **[18]** Medical Center.

Q And again, about how much time passes by the time you get to Memorial?

A From the time I left the police station?

Q Yes, sir.

A Eight minutes maybe.

Q And when you arrived at Sheboygan Memorial where was Mr. Mitchell at that point?

A He was in the back seat of my squad.

Q What, if anything, did you notice about his condition at that time?

A He appeared to be completely incapacitated, would not wake up with any type of stimulation, and had to be escorted into the hospital by wheelchair. Myself and another officer had to lift him into the wheelchair as he could not hold himself up, would not wake up, and his eyes were closed.

Q Describe the efforts you made to try to wake him up.

A I would shake his arm, lift up his hands, shake his hands, rub the top of his head.

Q Did he make any statements to you?

A Not at that point, no.

Q And how did you get him from the squad car into Sheboygan Memorial?

[19] A By a wheelchair. I pushed him.

Q And while he was in the wheelchair, what was his posture like?

A He was slumped over in the chair, could not lift himself up with any type of, like, sitting in a normal position.

Q And what did you do next?

A I completed the blood evidence paperwork. It's standard procedure. And I read him the Informing the Accused form verbatim from the form. He was so incapacitated he could not answer.

Q I'm going to have marked, Officer, Exhibit 1.

ATTORNEY WINGROVE: I think we should mark it as Exhibit 2 because I have an offer of proof I brought in as Exhibit 1 a while ago. Would just be a cleaner record.

THE COURT: That was brought in on a different day.

ATTORNEY WINGROVE: Absolutely.

THE COURT: Why don't we just call it 1A.

BY ATTORNEY HABERMAN:

Q Officer, I stand corrected. I'm going to show you what's been marked as Exhibit 1A. Can you identify this, sir?

A Yes I can.

Q What is it?

[20] A This is the Informing the Accused form, a copy of it, that I had read to Mr. Mitchell. After reading through the form, he was so incapacitated that he could not answer the question of "Will you submit to an evidentiary chemical test of your blood?"

Q And Officer, is that the actual form you completed in this case?

A Yes.

Q Exhibit 1A has several paragraphs here towards the top that are computer printed. Do you see that?

A Yes I do.

Q Did you read these paragraphs verbatim to the defendant?

A Verbatim, yes.

Q And when you got to the point of the second half or the lower portion of this form, is this your handwriting on the form?

A Yes it is.

Q And is that your signature in the lower right corner?

A Yes it is.

Q And is there an indication as to the date and time that this form was completed?

A Yes there is.

Q What is that?

[21] A Dated 5-30 of '13 at 1724 hours.

Q And do you recall when your arrest was made?

A No I don't.

Q I'm going to show you what's going to be marked as Exhibit 2. Showing you Exhibit 2. Do you recognize this, sir?

A Yes I do.

Q What is that?

A This is the Alcohol Influence Report.

Q And did you complete that in reference to this case?

A Yes I did.

Q And is that your handwriting on the form?

A Yes it is.

Q Is that a true and accurate copy of the form that you completed in this case?

A Yes it is.

Q And in that form does it indicate your arrest time?

A Yes it does.

Q And what time is that?

A 4:26 p.m.

Q And when you compare your arrest time to the time of reading the Informing the Accused, what's the difference there?

A Approximately one hour.

[22] Q Based upon your recollection of the incident, does that time frame sound about right from what you testified --

A Yes.

Q- to in terms of the arrest, going to the Police Department, and then ultimately going to Sheboygan Memorial?

A Yes.

Q And what did you write down as a response on Exhibit 1A in reference to will he submit to an evidentiary chemical test?

A "Couldn't speak slash incapacitated."

Q And did you mark a box?

A Yes I did.

Q And what was the box?

A Yes.

Q And as a -- on Exhibit 2 of the Alcohol Influence Report, did you indicate anything in reference to the preinterrogation warning section? In other words, when you asked -- did you ask any questions about drinking history after he was arrested?

A No I didn't.

Q Why was that?

A He was incapacitated.

Q And is that indicated on Exhibit 2?

[23] A Yes.

Q How?

A I wrote the words "incapacitated" across the signature field.

Q Just so I am clear and the record's clear, when you say incapacitated, what are you talking about?

A He physically could not answer, was not awake, was not alert.

Q And Officer, did you summon the -- strike that. After reading the Informing the Accused and the defendant didn't respond, what happened next?

A Blood evidence was obtained by the phlebotomist at the hospital.

Q And did you call for any other assistance in relation to the defendant's physical status?

A I didn't specifically request it. I had made mention of his current condition to hospital staff. Perhaps the amount of time between the time of arrest and the time the form was completed I do recall that, you know, medical efforts were being attempted at the same time that I was waiting for the phlebotomist. I recall that Mr. Mitchell was so incapacitated and couldn't answer any hospital staff as I stood next to him as well and did not awake while they placed catheters or any other type **[24]** of medical instruments on him.

Q I'm going to show you what's been marked as Exhibit 3. And Officer, I want to clarify with you this Exhibit 3 before you go over and identify it. You can see Exhibit 3 is two pages. It's a front and back, right?

A Yes.

Q The front I'm going to ask you to talk about. The front is identified as having the exhibit sticker. The back I'm not going to ask you any questions for. It's unfortunately just a lack of doing a good job of copying on my part.

ATTORNEY WINGROVE: And just so the record is clear, we would for reasons I'll explain otherwise, we would object to the back part of the document being received into evidence.

THE COURT: What is Exhibit 3?

ATTORNEY WINGROVE: That would be the WSLH laboratory report.

THE COURT: Do we really need the lab report?

ATTORNEY HABERMAN: What Attorney Wingrove -- the lab report is the part that we're not going to talk about.

ATTORNEY WINGROVE: Why don't I give you my file copy of that document, and it won't have the lab report **[25]** on the back of it, and I'll just trade you if that's acceptable.

BY ATTORNEY HABERMAN:

Q I'm going to reshow you what's been remarked as Exhibit 3 so we don't have this problem of a back side of a page. Do you recognize Exhibit 3, sir?

A Yes I do.

Q What is that?

A This is the State of Wisconsin Blood/Urine Analysis form that is completed during the blood draw.

Q And in fact, do you complete part of that form?

A Yes I do.

Q What part?

A The upper portion, parts that are listed A, part B, and part C.

Q And is this the form that you completed in this case?

A Yes it is.

Q At what point in the process do you complete

this form?

A Just prior to the blood draw.

ATTORNEY WINGROVE: And again for the record I have no objection to the form being received for what the officer did and what he said. But the parts of the form that are filled out by someone else, we would be objecting to them **[26]** being received as I don't think the appropriate steps have been taken for that information to be disclosed or redisclosed.

THE COURT: I really don't understand why there's an objection. I think all we're here today is whether or not there was a violation of Mr. Mitchell's rights when the blood was drawn. Isn't that the whole issue?

ATTORNEY WINGROVE: Yes. But again, I'm going to take this in a slightly different direction and suggest that the blood draw made at the hospital by the hospital staff under the facts and circumstances as they then existed is subject to confidentiality under the federal rules brought by 92 DHS.

THE COURT: I'm hesitating because that's -as I read your motion, that's not what I understood this to be today.

ATTORNEY WINGROVE: That is correct. The motion is a straight suppression motion. But I did alert the Court that I was going to be making this argument, and this is an extension of the motion saying they should have had a warrant to get that blood. And now the argument's going to be because that blood draw is subject to federal confidentiality rules.

THE COURT: I'll receive it the way it is. I've never had a motion like this before. I'll receive the

[27] exhibit as it stands. If I look at it and I see something in the document that appears that it should not have been admitted, then I'll reconsider, but I'll accept it the way it stands.

ATTORNEY WINGROVE: I understand the ruling. I just ask the record reflect a continuing objection.

THE COURT: That's fine.

BY ATTORNEY HABERMAN:

Q Officer, are you present when anyone else completes parts of that form?

A Yes.

Q And what part would that be?

A Part D and part E.

Q And what is part D generally?

A The type of specimen that is being collected, the collection date, and the collection time.

Q And the person collecting is on there too?

A Yes.

Q And what's the person's name on the form?

A Jennifer Gatzke.

Q Was -- based on your recollection was that the person who collected the blood in this case?

A Yes it was.

Q And is there a time that's indicated as to when the blood was collected?

[28] **A** Yes there is.

Q When is that?

A 1759 hours.

Q Based on your recollection and your presence during completing this form and Ms. Gatzke completing this form, is that time accurate?

A Yes it is.

Q When -- did Ms. Gatzke collect the blood of the defendant?

A Yes.

Q And was that blood turned over to you?

A Yes it was.

Q Okay. Do you recall what was going on at the time that the blood draw was being performed in terms of medical treatment, if any?

A At the specific time I believe he was just being monitored at that time. I don't know of any other medical procedures being done.

Q You mentioned at one point in your testimony about a catheter. Do I understand right?

A Yes.

Q Okay. Tell me about what happens when you're at the hospital then. Take me through this to the blood draw moment. Do other hospital staff get involved in medical treatment prior to the blood [29] draw?

A Yes.

Q Okay. Tell me about what you saw generally. I'm not interested in the very specifics, but who's doing what at what time?

A I recall specifically one nurse inserting a catheter into his penis attempting to obtain a urine.

Other than that I'm not a medical professional. I don't recall specifically what other procedures were done.

Q Were people working on him other than that?

A No. They were basically just monitoring him during that time frame.

Q And I just want to make the record clear on this 'cuz I'm just trying to picture this in my mind. When you guys arrive at the hospital, is it like you're going to an emergency room treating someone who has just been injured, or is it like you're doing an OWI investigation, or something else?

A Doing an OWI investigation. However, it was unusual that he was incapacitated to the point that he was. Medical staff were monitoring his condition. They were certainly aware of his condition. And -- yeah.

Q Did you guys go into an emergency room, or did you **[30]** go into a different room where a blood draw is done?

A This is done in an emergency room where typically all the other emergency -- I'm sorry – the emergency room is used for the blood draws itself.

Q Okay. You went to the room where the blood draws are normally done.

A They're typically done right in the room we go in. It's -- typically there's one room we usually use. However, we were in the room next to that one because of his condition.

Q Okay.

ATTORNEY HABERMAN: I don't have

anything further, Judge.

THE COURT: Thank you. Mr. Wingrove.

CROSS-EXAMINATION

BY ATTORNEY WINGROVE:

Q First I want to ask you some general questions about Alvin Swenson. Do you know Mr. Swenson at all?

A Yes. I've met Mr. Swenson.

Q How many times?

A Once I believe.

Q Did you have any other knowledge from Mr. Swenson you gained from other law enforcement?

[31] A I've known of Mr. Swenson through other investigations that I was part of, but I never met him as a result.

Q Okay. And when you say you met him once, you mean this occasion on May 30th?

A Yes.

Q Okay. What generally did you know of Mr. Swenson? Did you know if he was reliable?

A I don't have an answer for that question.

Q Did you know if he was a criminal?

A I was involved in criminal investigations with him.

Q What were the nature of those investigations?

ATTORNEY HABERMAN: Judge, I'm going to object to irrelevant for today's purposes.

THE COURT: I think the question is relevant to

a point. But it goes to Mr. Swenson's credibility and what the officer knew about Mr. Swenson.

THE WITNESS: Could you repeat the question?

BY ATTORNEY WINGROVE:

Q Did you know if Mr. Swenson was a criminal?

A Yes. I know he had been arrested.

Q Do you know whether he's been convicted?

A I don't recall specifically.

Q Do you know how many times? I'm sorry. I withdraw the question. **[32]** When you went to speak with Mr. Swenson, did you know where he was living?

A Yes.

Q What was -- what's your understanding of where he's living?

A It's a temporary living facility.

Q For what sort of individual?

A People that are released from jail.

Q Did he appear to be under the influence of any intoxicants?

A Not that I noticed. I'm assuming you mean Mr. Swenson?

Q Yeah. I'm sorry. Thank you. Yes.

A Okay.

Q What was his mannerism like when you spoke to him?

A He seemed genuinely concerned for Mr. Mitchell.

Q What does that mean? Was he excited? Was he sad? Was he happy? Was he talking fast? Was he talking slow? What were his mannerisms like?

A He was legitimately concerned. He really wanted us to go out and find him and make sure he was okay. He stressed that to us several times.

Q Now, you've been involved in numerous OWI investigations, right?

A Yes.

[33] Q You received training in OWI investigations, right?

A Yes.

Q You said you went to try to wake Mr. Mitchell up at one time, right?

A Yes.

Q What did you do?

A I shook him several times, shook his arms. Called his name.

Q Did you attempt a deep sternum rub?

A I don't believe so.

Q Is that one of the things you're trained to do?

A I don't believe I was ever trained to do that.

Q Have you ever done that?

A Not -- I mean, I've rubbed people's chests before but -- I mean, I'm not trained in the deep sternum rub that you're asking about.

Q Is that typically used to arouse unconscious people?

A It can be.

Q Have you taken anyone in to a 51.15 emergency detention in Sheboygan?

A Yes.

Q Where do you take them to?

A Memorial.

Q How about 51.45? Have you done one of those, an **[34]** alcohol detention?

A Yes.

Q Where do you take 'em to?

A Memorial.

Q Now I want to direct your attention to May 30th and just try to build a time line for a minute here if we may. You were dispatched at about 3:17, correct?

A Yes.

Q You probably arrive within about five minutes. That's consistent with your testimony at the preliminary hearing, correct?

A Correct.

Q How long did you speak to Mr. Swenson for?

A I don't recall specifically.

Q Okay. Well, let's try it this way. Say you got there about 3:22, 3:25. How soon -- when did you get the call from the community service officer?

A That was after I had talked to Mr. Swenson. I was out in my patrol car trying to find investigative information, perhaps a license plate, providing a text message on a computer or over the radio to other officers to assist in locating him.

Q So you're doing that for a while?

A It took a few minutes, yes.

[35] Q About how long?

A I don't recall. I also had a conversation with Mr. Mitchell's mother at the same time trying to gain information from her.

Q When did you first have contact with Mr. Mitchell?

A After the CSO had informed me of the suspicious individual.

Q Okay. And according to the -- I think it's Exhibit 2 -- you arrested Mr. Mitchell at 4:26. How much time did you spend with Mr. Mitchell talking to him before you arrested him?

A I don't recall specifically.

Q You think it would have been a half hour?

A I don't think that long, no.

Q Less than a half hour.

A I would think so, yes.

Q Okay. And if I told you that I reviewed the video and you put him in the back of the squad car at about 4:15, that would be consistent?

A If that's what the video said.

Q You wouldn't dispute that.

A If that's what the video says I wouldn't.

Q Okay. And then you take Mr. Mitchell to the police station. Do we know what time we arrived?

A No I don't.

[36] Q How long were you at the hospital before you read him the Informing the Accused?

A I don't recall specifically.

Q There was some mention about the room the blood
draw was done in. Is that done in the ER?

A Yes.

Q Okay. Is the ER one big room, or is it a large room with little rooms facing off of it?

A One room with a lot of little rooms facing off of it.

Q Okay. And the blood draw wasn't done in the usual blood draw room owing to Mr. Mitchell's medical condition, right?

A Yes.

Q And the medical condition was that he was unconscious, right?

A Yes.

Q And he was admitted to the hospital, correct?

A Yes.

Q And you testified that you saw at 1759 the blood draw was performed, right?

A Yes.

Q And that was about 35 minutes after you read the Informing the Accused to Mr. Mitchell, right? It's math.

[37] A Yeah.

Q 1724, 1759. The phlebotomist was an employee of the hospital, right?

A Yes.

Q And did she put identifying information on the

blood sample she drew?

A On the samples itself, the tubes?

Q Yeah.

A I believe she initials the tape that's on there.

Q And was there some sort of identifying information for Mr. Mitchell put on those? I mean, there's got to be some way to track it, right?

A Yeah.

Q So did you see that happen or not?

A I don't recall specifically, no.

Q But it's your understanding that customarily happens, right?

A I believe so, yes.

Q To establish a chain of custody. That would be correct, right? That's why that happens?

A Yes.

Q You could have gotten a warrant to draw Mr. Mitchell's blood at the hospital, couldn't you have?

A I could have applied.

[38] Q I'm sorry. Yes. You could have applied, correct?

A I suppose.

Q Police do that on a fairly regular basis, don't they?

A Now yes.

Q How long does it typically take?

A I don't know. I haven't done a warrant blood draw yet. We just started doing those.

Q It's fair to say that you watched Mr. Mitchell's condition deteriorate in front of you, right?

A Yes.

Q So if there was some sort of blood alcohol or drug curve going on, the numbers were probably getting higher, not lower, right?

A I don't know that.

Q He got sleepier and sleepier and eventually passed out in front of you, correct?

A In the back of my squad, yes.

Q Okay. Do you know if Mr. Mitchell was eventually admitted to the ICU at Memorial?

A Yes.

Q Was he?

A Yes.

Q Okay. Do you know if he was eventually admitted to 1-K at Memorial?

[39] A That's my understanding.

Q That would be a yes?

A Yes.

Q Just a moment please while I go over my notes. Okay. And the reason you take people for emergency detentions or emergency alcohol detentions to Memorial is because that's where we take them in Sheboygan County, right?

A Yes.

Q Okay. Just a few odds and ends to clean up now please. There was some questioning on direct examination that in order for Mr. Mitchell to come

back to his apartment from the lake, he would have to walk through an area where you were standing. Do you sort of remember that?

A Yes.

Q Okay. Is it fair to say -- what direction was Mr. Mitchell moving when you saw him, first saw him?

A From the north to the south.

Q Okay. So that would have been sort of parallel to the lake, correct?

A Yes.

Q So it's possible he could have come back from the lake and taken some other street other than the **[40]** street you were standing on, right?

A Yes. I did not see him on St. Clair Avenue.

Q And there's other ways to get from the lake to where you saw him than just St. Clair Avenue, right? There's a lot of other streets.

A Yes. St. Clair would be the most direct.

Q You testified when you got back to the station you spoke with your supervisor, and you decided a blood draw would be more appropriate. You remember that?

A Yes.

Q Why?

A Because of his current condition.

Q That being that he was unconscious?

A He was not unconscious quite. I mean, he was closing his eyes, and I mean, he was arousable.

Q Okay. If he was going progressively downhill in

front of you, why didn't you read him the Informing the Accused at that time?

A I don't know.

Q Were you at that time concerned that he was going to pass out?

A It was a concern.

Q Okay. One last point. You had testified that Mr. Mitchell later changed his story.

A Yes.

[41] Q You asked him questions about drinking down at the lake, right?

A Yes.

Q And he admitted to drinking down at the lake, right?

A Not initially, but yes. That's what he had changed his story to.

Q And that was the change in the story?

A Yes.

Q And you don't know whether he walked back from the lake or drove back from the lake, do you?

A He told me that he parked his car on Michigan Avenue 'cuz he was too drunk to drive.

Q And you don't know whether that was before or after he went to the lake?

A No.

Q You said he parked it by the lake. I figured I was too drunk to drive. But you don't know whether he got drunk before or after he parked his van, right?

A Right.

Q And he said he was drinking in his apartment, but you don't know whether he was drinking in his apartment before or after he went to the lake, right?

A He was -- I'm sorry, can you repeat the question?

[42] Q Sure. Mr. Mitchell said he had been drinking in his apartment, right?

A Yes.

Q And you don't know whether he was drinking in his apartment before or after he went down to the lake.

A I don't believe he was in his apartment during the time of my investigation.

Q That's because you knocked on the door and he didn't answer the door, right?

A Right.

Q And later on in your investigation it became pretty clear that he really didn't want to talk to a police officer, didn't it?

A Right.

ATTORNEY WINGROVE: No further questions.

Thank you.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY ATTORNEY HABERMAN:

Q Did you ever receive, Officer, any information after Mr. Swenson provided you the information of the defendant getting in his gray van? Did you receive any information after that to suggest that the

gray van never returned?

A No.

[43] Q Approximately how far in blocks or however you want to characterize it is the location of where Mr. Swenson observed the gray van near Eighth and St. Clair in relation to the 300 block of Michigan where the van was found?

A Four or five blocks.

ATTORNEY HABERMAN: I don't have anything else then, Judge.

THE COURT: Anything else on that?

ATTORNEY WINGROVE: No. Thank you.

THE COURT: Thank you, sir.

ATTORNEY HABERMAN: Your Honor, for the record I move for the admission of Exhibit 1A, 2, and 3.

THE COURT: Any objection?

ATTORNEY WINGROVE: I just ask the record reflect the previous objections I made, especially to the portions of the blood draw filled out by the hospital employee.

THE COURT: So noted. But they're received. Anything else, Mr. Haberman?

ATTORNEY HABERMAN: No evidence, Your Honor.

ATTORNEY WINGROVE: Just argument, Your Honor.

THE COURT: All right. Mr. Haberman, go ahead please.

[44] ATTORNEY HABERMAN: Thank you, Your Honor. I outline the gist of my argument in my brief to the Court dated October 14th. This is a blood draw pursuant to the implied consent law under 343.305. It is lawful pursuant to that. The fact that this was a blood draw done under the implied consent law means that this was a lawful blood draw and the evidence is lawfully obtained.

Missouri v. McNeely has absolutely nothing to do with this case. In the implied consent law under subsection 343.305(3)(b), a person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent. So we have the status of the law as presuming someone has given consent. And just because their state becomes unconscious or not capable of withdrawing consent doesn't change the fact that they have agreed to have their blood drawn as part of Wisconsin law. Therefore, a blood draw once a person is unconscious pursuant to the implied consent law is still lawful.

We do need to look at a couple decisions to interpret unconscious operator as well as otherwise not capable of withdrawing consent. And that is generally *State v. Disch*, 129 Wis.2d 255 [sic] as referenced in my brief. It is in that case that the phrase unconscious is defined as (as read) "a person who is insensible, incapable of responding to sensory stimuli, or in a state lacking **[45]** conscious awareness." That is from page 234.

That is what we had here. That meets the definition as described by Officer Jaeger of the defendant's state. He would further, I guess, could be characterized as otherwise not being able -- otherwise not capable of withdrawing consent, but I think it's

more accurate to describe him as unconscious under the definition provided under *Disch*. Although the otherwise is described as (as read) "a person who has conscious awareness and can respond to sensory stimuli but lacks present knowledge or perception of his or her acts or surroundings." There was a discussion in *Disch* about that as well as *Hagaman*, H-A-G-A-M-A-N, which is referenced in my brief.

The bottom line is in this case the defendant was unconscious. It should be noted that in *Disch* the Court -- the Wisconsin Supreme Court said that the officer does not have to provide the information in an Informing the Accused form to a person who is unconscious 'cuz it doesn't serve any means at that point. The officer did do that though here, and that is, I guess, certainly to his credit as he was doing his best to comply with the complied consent law.

Once there was no response the officer could lawfully conduct a blood draw and, in fact, follow the standard procedures that the Court and everyone is familiar with regarding an OWI investigation. There was a blood draw **[46]** pursuant to the blood draw paperwork that is typically used, and the blood draw procedure was followed.

There's nothing to suggest this was a forced blood draw. There is nothing to suggest that this is a blood draw on a exigent circumstances situation when there has been a concern for exigency. This is not that case. It's not *McNeely*. It's not *Schmerber*. And it's not *Bohling* in Wisconsin.

Based upon the status of the defendant at the time this was a lawful blood draw. There's nothing about this blood draw that has suggested it was through some other hospital means or hospital record

obtaining means. Any such argument I think is merely speculation by the defense.

And on a side note, I would object to the argument about this. I don't think it's properly before the Court. I think the argument about this administrative code in DHS and confidentiality, once the defense filed their brief and cited *McNeely* as their authority to suppress this evidence, I don't think that this issue's appropriately before the Court.

If Attorney Wingrove was, I think, sincere about saying this is really where the issue is, then that should have been included as his authority in his brief, and it should have been articulated in advance to the Court rather than walking into the motion hearing and saying, here's some Administrative Code printouts from Westlaw, and here is my [47] argument. So I think that that issue is inappropriately before the Court.

That being said, it's a separate concept and distinct from this lawful way of obtaining blood evidence which is done in this case pursuant to the implied consent law.

THE COURT: Thank you. Mr. Wingrove

ATTORNEY WINGROVE: Thank you. I guess to respond to the last argument first, I did tell the State and the Court I was going to proceed down this path when I first appeared. I received the State's position 48 hours ago, and that precluded me from -- you know, this is the next step. I'm going to file this. I look for them to argue implied consent. Then I'm going to go down this path. It's a logical progress there. If it needs to be briefed, great, it needs to be briefed. If the Court wants me to file a motion on it, I can do that. I can get the transcript from today. I can

use that as my evidence.

With that said, we have a warrantless blood draw. They could have got the warrant. They didn't. There were no exigent circumstances. They're arguing implied consent. Okay.

Two basic problems with implied consent as I see it. The first and most significant one is if a police officer's confronted by someone who is gradually losing consciousness, **[48]** why not give him the Informing the Accused when he asks him to do the field sobriety. That way the issue's out there. That way you get it taken care of. The officer clearly knows this guy is deteriorating and going down in front of him. Somewhere along the line he should have, could have, should have done that. It would have been proper, would have been appropriate.

I'm also a little bit concerned on the implied consent on the blood draw because apparently there was, like, a 35-minute delay between reading the Informing the Accused and having the blood draw occur.

And I'm sorry, I need to digress for a moment. The implied consent cases the State relies upon talk about a situation where the officer comes upon an unconscious person. That's not this case. In this case the officer is talking to the person. The officer is asking him questions, asking him to perform field sobriety tests. So that distinguishes those cases and gives this case a different posture.

The last thing that we have is the blood draw that was made. The blood draw was made by a hospital employee. It's a facility that receives people under 51.15 and 51.45. That my client was obviously a patient at the time 'cuz he was receiving treatment.

Any identifying information from the hospital as a treatment record, that would include his name on the blood vial, and they're all subject to federal [49] confidentiality laws under 92 -- DHS 92, and there is a procedure for the disclosure of that information. And that's set under 42 CFR part two, 2.65. And I've given the Court a copy of that. That procedure wasn't followed. There's another procedure for investigations, but that can't be used in a criminal prosecution.

And finally, if that information is disclosed -- and this is on the last page of the information I've given the Court -- it's a crime to disclose or redisclose that information.

And that information has been disclosed. It has been redisclosed. And frankly, if the State -- I don't think intentionally or maliciously -- but is doing things that are criminal, that's a violation of my client's rights under the Eighth and Fourteenth Amendment to the U.S. Constitution. And the results from that test should be suppressed.

So for all those reasons we would ask that the warrantless blood draw be suppressed 'cuz in the alternative, what they could have done, what they should have done is applied for the warrant and avoided all this other issues that come up on a -- what ends up being a direct admit to a mental health treatment facility. And the testimony was clear. He passed through the ICU to 1-K.

So for all those reasons we ask the evidence from the blood draw be suppressed. And I would note in making [50] that request that's not going to prevent the State from going forward with this case.

THE COURT: All right. Thank you. Well,

regarding the warrantless blood draw, I think the State is correct in their position. And I read the *Disch* case after I got Mr. Haberman's brief. And I find that it gave ample support for the State's position that no warrant was required because Mr. Mitchell was unconscious.

The officer's testimony was that he took Mr. Mitchell after the arrest to the Police Department. Mr. Mitchell was -- it sounded to me like he was kind of with it initially, but he was deteriorating. And they get to the police station, and they're not sure that he can submit to a breath sample. So they take him to the hospital. And on the way to the hospital, he deteriorates to the point where he cannot be shaken awake. To me that's unconscious.

And the law -- when I refer to the law I'm referring to 343.305(3) (b) -- makes clear that an unconscious operator has -- cannot withdraw their consent to a blood sample. The only issue really regarding the warrantless draw is whether or not there is probable cause. That's the threshold question to whether or not you can do the blood sample.

And I find there is probable cause. I think the way the whole investigation went down -- I'm not being critical of anyone because the officer's just following his leads, and **[51]** there's really no one other than Mr. Swenson who saw Mr. Mitchell driving. And so there may be proof problems for the State in the long run. But as far as probable cause, I don't have a problem with finding probable cause.

Mr. Swenson said that Mr. Mitchell was drinking. He got into a car. That's what he advised the officer. The officer had contact with Mr. Mitchell's mother to help identify the vehicle. Eventually he finds Mr.

Mitchell within the hour, and Mr. Mitchell is very drunk. And he made the comment that he was -- I can't recall precisely what it was, but it was to the effect that he was too drunk to drive. I don't have a problem with probable cause.

Now, as far as the other issue that came up today, I'll entertain it. I agree with Mr. Haberman that notice was faulty. But I feel comfortable proceeding.

And I'm looking at the section that Mr. Wingrove provided to me. That's 42 CFR Chapter 1, Section 2.3(a), and that's Purpose. I'll read what it says. (As read) "Under the statutory provisions quoted in Sections 2.1 and 2.2, these regulations impose restrictions upon the disclosure and use of alcohol and drug abuse patient records which are maintained in connection with the performance of any federally assisted alcohol and drug abuse program."

There's no allegation that what happened was part of a drug abuse program. This is a simple OWI -- don't [52] interrupt me. I know you want to interrupt me, Mr. Wingrove, but don't.

This is a simple OWI investigation. Nothing more, nothing less. And the officer takes Mr. Mitchell to the hospital as they routinely do on OWI investigations. I don't care if they do Chapter 51.45's at Memorial. It doesn't matter. He takes him there.

They go through the regular procedure. Blood is drawn. And what I think is key is that the phlebotomist then gives the blood back to the officer. That's not part of any treatment program. And the officer does with it what he does. And that's his end with Mr. Mitchell.

At this point if Mr. Mitchell goes from the ER to

ICU to 1-K, that's another matter, but that's just a distraction. It's got nothing to do with this case. If the State did try to get information from the hospital regarding Mr. Mitchell after he had been admitted to 1-K, I think there would be a problem. But that's not what's going on. This is just a simple OWI investigation. Nothing more, nothing less.

So for those reasons I'm denying the motion.

Anything else?

ATTORNEY WINGROVE: I understand the Court's ruling. I would just direct the Court's attention to DH 92 which says that certain facilities that federal rules become applicable to, and that was -- at that time he was receiving **[53]** treatment at the time the blood draw was made. I agree it was separate from, and I understand that.

THE COURT: I think what you're doing, Mr. Wingrove, is just creating a huge distraction. It's a simple OWI investigation. That's it. He's getting no more treatment than any other person who's taken to the hospital for a blood draw when they're drinking and driving. That's it.

All right. Thank you. Do we have a trial date?

ATTORNEY HABERMAN: I'm looking. I don't see that we have a current trial date.

THE COURT: Let's set a trial date for December 17th. December 2nd at four o'clock we had another hearing with Mr. Wingrove. We can put Mr. Mitchell down at that time for motions in limine. Anything else?

ATTORNEY HABERMAN: No. Thank you.

ATTORNEY WINGROVE: Not today.

THE COURT: All right. Thank you.

***** (End of proceedings.) *****

State of Wisconsin
Circuit Court
Sheboygan County

State of Wisconsin,
Plaintiff,

v.

Gerald P. Mitchell,
Defendant.

Case No. 13 CF 365

Before the Honorable Terence T. Bourke
December 17, 2013

Transcript of Proceedings [EXCERPT]

* * *

[87] And Mr. Haberman, whenever you are ready you can

call your first witness.

ATTORNEY HABERMAN: Thank you, Your Honor.

The State will call Alvin Swenson.

THE COURT: If there's ever a break between witnesses and you want to stand up and stretch, that's okay. Especially in the afternoon it starts to carry on quite a

bit, so feel free to do so.

Mr. Swenson, before you sit down if you would please raise your right hand to be sworn in.

**** ALVIN SWENSON, ****

called as a witness, having been first duly sworn, was examined and testified as follows:

COURT CLERK: Please state your name and

spell your last name.

THE WITNESS: My name's Alvin Swenson,

S-W-E-N-S-O-N.

THE COURT: Go ahead please.

[88] ATTORNEY HABERMAN: Thank you.

DIRECT EXAMINATION

BY ATTORNEY HABERMAN:

Q Mr. Swenson, how old are you?

A I am 44, sir.

Q And are you currently employed?

A Part-time.

Q What do you do part-time?

A Construction.

Q What type of construction?

A Roofing, siding, windows, painting.

Q And where do you live?

A I live at 922 North 11th Street, Sheboygan, Wisconsin.

Q And how long have you been there for?

A Six months.

Q Mr. Swenson, have you ever consumed alcohol before?

A I have.

Q Have you ever been intoxicated before?

A I have.

Q Have you observed other people who had been consuming alcohol and become intoxicated?

A I have.

Q Tell me about some of those observations you've made to form that conclusion that someone's **[89]** intoxicated? What do you see about 'em?

A Slurred speech, stumbling, fumbling around, you know, motor skills.

Q Any formal type training to see someone who's intoxicated?

A Just experience with it myself.

Q Okay. So during the month of May 2013 had you been living at that North 11th Street address or no?

A No.

Q Where were you living in May of this year?

A I was living on North Eighth Street.

Q Is that at 1127 North Eighth Street?

A It is.

Q And that's in the city of Sheboygan, Sheboygan County, Wisconsin.

A It is.

Q Do you know a person named Gerald Mitchell?

A I do.

Q Do you see him in court today?

A Yes, sir.

Q Can you describe him for the jury by what he's wearing and where he's seated?

A He's wearing a dark-colored suit with a white hat in the defendant's chair.

ATTORNEY WINGROVE: For today's purposes we'd **[90]** stipulate that the witness has identified Gerald Mitchell.

THE COURT: All right. Thank you.

BY ATTORNEY HABERMAN:

Q On May 30th were you living at that North Eighth Street address?

A I was.

Q Do you know where the defendant was residing around that time?

A He was in transit moving from that residence to a new apartment he had just acquired.

Q And do you know what street that was on?

A I want to say St. Clair.

Q Why don't I ask it a different way. Where in relation to your apartment is he residing?

A Directly behind the apartment I was residing in.

Q Okay. But that would have been on St. Clair you think.

A Right.

Q Can you see that residence from your apartment?

A Yes.

Q Tell me about that. What's your -- what are you able to see?

A The back, the side and the back of the apartment he moved in, the backyard, the whole parking lot. There's a couple businesses right around the area **[91]** so kind of all share a parking lot.

Q Is it -- is this one of these apartment buildings that has the typical paved parking lot, or is there something --

A It's kind of separated. The back of the apartment that I lived in was paved, and there's a alleyway that goes through that, separates would have been his apartment to my apartment. And then where he resided it was kind of like gravel, grass, dirt, mixture of things. It wasn't paved.

Q Okay. And what, if any, information or contact did you have about the defendant on May 30th?

A There was a phone call that come in to the apartment, and I was the only person there at the time, so I had answered the telephone 'cuz I was also waiting for a phone call. And it was a woman on the phone asking to speak to one of the other roommates that had also lived in the apartment.

And I had informed her that, in fact, he was not at home at the time.

Q And you said you were waiting for a phone call. What kind of phone call were you waiting for?

A I was waiting for a phone call from my wife.

Q And why were you waiting for that phone call?

A We were going to dinner.

[92] Q Okay. So when you answered the phone, what, if anything, did you learn?

A I learned that there was a frantic woman on the other end of the phone, very scared person looking for her brother.

Q And how could you tell that she was frantic and scared?

A Just by her voice. I mean, you can hear.

Q What did she tell you about what she was looking for or what was going on?

A She wanted somebody to go check on her brother.

Q What did she say was wrong with her brother?

A She said that he had made a phone call to another family member and had made some allegations that he was possibly thinking about maybe hurting himself.

Q Like suicide?

A Exactly.

Q So when you spoke to this woman on the phone, what, if anything, did you do?

A I was really reluctant to even get involved 'cuz I really didn't know the person well, maybe a day or so interactions. But just the tone of her voice and I mean, she was pleading at that time pretty much for somebody to go check on her brother. And I did. I left the apartment and had went back to **[93]** his apartment, opened the downstairs door, and yelled his name several times.

Q And let me stop you there. You indicated that you were reluctant to get involved because you had only really known this person for a day or so. When you're saying that, who are you talking about?

A The defendant.

Q Okay. So just to be clear, had you been friends with the defendant before this?

A No, sir.

Q Enemies?

A No, sir.

Q So you go to his apartment, and are you going to the front or the back of the place or the sides?

A Actually the only entrance I know to get in would be the back of the apartment.

Q And is that in the same location as where the parking lot, the gravel parking lot is?

A It is.

Q And you yelled for his name. Tell me what happened.

A I yelled for his name several times. I could hear him upstairs. It appeared to me that he was upset about something. I thought for a minute that maybe somebody was up there with him 'cuz there

was some [94] shouting, yelling. I had his sister on the phone, and I did ask her if she knew if there was -- if there was anybody with him.

Q So you -- are you still on the phone with this person as you walk to --

A Correct.

Q Okay. And how do you know that it's him that's yelling upstairs? At this point had you seen the defendant?

A No, I didn't know.

Q Okay.

A I had no idea who it was.

Q All right. So what happens next?

A I raise my voice, I guess, quite a bit louder and yelled his name two, three, maybe four times more. And then I had actually visually seen him up at the top of the stairs.

Q Tell me what you observed.

A He was, I guess, highly agitated about something. Something I could tell was definitely wrong at that point. He wasn't happy. And when he seen me down at the bottom of the stairs, it made him less happy.

Q What do you mean by that?

A Well, he got verbal, got loud.

[95] Q Did he yell at you?

A Couple times.

Q Did you notice anything about his mannerisms or his demeanor?

A Just that he was at that time that he was highly agitated about something.

Q At this point had you smelled anything?

A I did when I first walked into the back door. I didn't walk into the back door all the way 'cuz I didn't know what I was walking into really. So I just kind of stepped in halfway. And you could smell a very strong odor alcohol.

Q And do you have any reservations that that was the odor that you smelled, that it was alcohol?

A Oh, it was definitely alcohol.

Q How strong? Can you quantify it at all?

A On a scale between one and ten, five, six maybe.

Q Okay.

A I was on a downstairs landing. The door was open. I really didn't know where it was coming from, garbage, another neighbor, you know. I didn't know.

Q Okay. Did you see anyone else around the area at this point?

A No.

[96] Q What happens when the defendant steps out of his door? What happens next?

A I had asked him if he was okay. And during the process with him yelling at me, his sister's also trying to ask me questions on the phone. So I'm trying to hold two conversations, reassure her that, in fact, he is okay, he's standing in front of me. I do have visual contact with him, and he is speaking to me. I informed him that I was on the phone with his sister, and that's probably what I shouldn't have did because

it highly agitated him at that time, and he had started coming down the stairs towards me.

Q Tell me what happens next.

A I had backed out of the apartment. I had removed myself completely from his property. Our property is so close, it's probably ten feet, and I'm back onto property of the apartment that I was living in. And that's what I did.

Q Were you still standing outside at this time?

A I was.

Q And then what did you observe?

A I observed the defendant. He come downstairs all the way, and he looked like he was alive and well. I informed his sister I was gonna also -- I was **[97]** gonna try and contact one of the other roommates 'cuz he was very much more familiar with Jerry than myself. And I didn't know if this was something that has reoccurred in the past or if it was something new and somebody knew how to deal with this situation 'cuz I sure didn't. And I didn't want to deal with the situation. I had, you know, other things to do.

Q What, if anything, did you see the defendant do next?

A Shortly afterwards I had taken myself out of the whole back of the parking lot and moved in between the buildings and went around, and I had made a phone call to a roommate by the name of Javier Yera and explained to him about the phone call that I received, if there was anything that he could do. If he was in the location maybe he can come and contact Jerry, try to figure out what was going on, if there was anything that somebody could do to,

you know, help him or whatever that he needed at the time.

Q And when did this contact with Javier happen in relation to the original phone call you got?

A In minute wise?

Q Sure, yeah.

[98] A Probably maybe four to six minutes.

Q Okay. Do you remember when you got the initial phone call?

A The exact time? I guess it was -- my wife was to call me somewhere between three and 3:30, and it was probably just shortly before three o'clock.

Q Okay.

A Very shortly before three o'clock because I did think that was her that was calling.

Q Do you remember a specific time at all?

A Between I'd say 2:50, 2:55, roughly right in that general ballpark.

Q Okay. And after you had this phone conversation with Javier, what happens next?

A Javier told me he was going to make another -- he was going to call somebody that was familiar with Jerry and contact me back, call me back. And asked me if my wife called to come pick me up to just wait to try to keep an eye on Jerry to make sure he was going to remain okay.

The apartment I lived in was on a second level. In the back of the apartment there is kind of like a little balcony, patio kind of thing. And the requirements of that property is you can't smoke inside the buildings.

And I'm a smoker, so **[99]** I stepped out on the little balcony to smoke a cigarette and wait for the returning phone call.

Q And what happens, if anything, while you're out there?

A Well, I got the phone call from Javier, and I was actually on the phone with him at the time, and he had told me to stay there. He had already contacted the Police Department, and they were coming to make contact with me.

And as I'm talking to Javier on the phone, Jerry walks out his back door carrying what I think is garbage in a bag. He walks across the parking lot kind of that he lived in is kind of long. He walked the side of his van to the garbage area and put the bag down, and then headed back towards his apartment, which I was kind of hoping that's where he was going to go.

Q Let me stop you there. Why were you hoping that's where he was going to go?

A Well, 'cuz I was just informed that the police were coming to contact me. And once again I'll say it, I did not want to get involved in this whatsoever. This was none of my business. You know, I was a new roommate there, wasn't familiar with the person, you know. Got a phone call, and this is **[100]** telling me somebody's going to commit suicide. It kind of scary thing, you know.

Q So you're watching Jerry put this garbage bag down. And what happens next?

A He walks back in the direction of his apartment. And like I say, I was hoping that's where he was going. And he approached the side of a

minivan and got in it. And kind of when I really got worried 'cuz he drove off. He started the vehicle, got in the vehicle, and drove off.

Q And describe this minivan that you saw.

A Grayer, a gray color minivan. I really can't describe -- I mean, minivans are minivans besides the color of it. I don't know what kind of make or model it was.

Q Did you watch Jerry get in the driver's seat?

A I did.

Q Did you see anyone else outside with him in the vehicle or near the vehicle?

A No, sir.

Q And what, if any, observations did you make about whether or not he was intoxicated?

A When he come down the stairs and he was, you know, screaming 'cuz he got really agitated that I was there, and like I say, on the phone with his [101] sister. At that point in time I don't think he wanted anybody to get involved in none of this.

And I'm a drinker, you know. I've drank for a number of years, so I know that you get some alcohol in you, you get the speech slurred. It's usually the first thing I notice where I realize maybe I've drank one too many. Might be time to stop.

And like I say, some motor functions you can tell. Like, walking, stumbling a little bit. He looked like, appeared to me -- but I'm not no expert -- that he might have been drinking some.

Q Any particular level of intoxication that you were able to observe?

A I guess by the interactions that I already had with him over the last day or so to that interaction and the way his speech was, he was pretty lit.

Q And did you notice him stumble at all?

A Once again, I'll say the parking lot's not blacktop or concrete or not. It's kind of gravel and grassy area. So I can't say whether it was caused by the ground or whether it was because he was drinking. But it wasn't a straight walk if that's what you're asking.

Q Okay. So you watched him walk, and you could tell **[102]** that he wasn't walking in a straight line, but you can't say whether or not that he was drunk and that was his walking pattern, or it was because he stepped on something in the parking lot.

A Correct.

Q Did he -- it sounds like your testimony is that he didn't walk in a straight line. Did he stumble? Did he trip or did he fall?

ATTORNEY WINGROVE: Objection. Asked and answered.

THE COURT: Overruled.

BY ATTORNEY HABERMAN:

Q You can go ahead and answer.

A No, he didn't fall. No. I mean, but it looked like he might have been having some difficulties walking across that parking lot.

Q Okay.

A Like I say, the parking lot's uneven. And I don't know what the reason was or why, you know, he was walking that way.

Q Do you know the approximate time that he got into the car?

A It had to have been somewhere probably maybe five to ten after three.

Q How is it that you are so certain or able to give **[103]** us kind of a five-minute window?

A 'Cuz I was waiting for a phone call from my wife, and I do have a cell phone, and I was on the cell phone with Javier when Jerry got in the vehicle. That's the first thing I said is, oh my God, Javier, he's getting in his vehicle, and he's going to drive off. Somebody's got to get here.

Q Why is that such a big deal to you?

A Because I'll say it again, this is not something I wanted to get involved in. I had prior plans with my wife, you know. That's how I wanted to spend my evening is with my wife and kids.

Q What were your concerns when he got in that vehicle?

A Well, unfortunately accidents happen, and if he was under the influence of alcohol at the time, public safety, you know. I got wife and kids in this community, you know, friends and family.

Q Had you seen this gray van before?

A I did see the gray van before. I knew it was his. But that was the last time I seen the van.

Q Okay. Had you seen that van in that parking lot before?

A I did see it parked in that parking lot for probably about a day-and-a-half, two-day period of **[104]** time.

Q When you were making these observations on May 30th around three o'clock and shortly thereafter, had you been drinking at all?

A No.

Q You indicated that you have drank in the past. Are you certain you weren't drinking at all?

A I am a hundred percent positive.

Q What about doing any sort of drugs?

A Absolutely not.

Q As part of -- once you observe the defendant get in the van and drive away, are you able to see where he goes?

A No.

Q And what happens next?

A Javier informed me once again that the Police Department was already contacted, and I was the contact person that they were coming to talk to and to do not leave the apartment. Or he asked me not to -- to just to wait 'cuz he already knew I had prior arrangements with my wife also 'cuz he tried to make plans with me for that evening to go work out at the YMCA, and I told him I couldn't.

Q Did you speak to the police then?

A I did.

[105] Q And about how long after you made your observations did the police come?

A Probably maybe 15 minutes at the most. First it was one officer, then another officer had pulled up. I had went out on -- I had went out on Eighth Street

out to the front of the apartment and just waited for 'em.

Q And did you provide a description of what you observed to the police?

A I did.

Q And did you make a written statement to the police?

A I did.

Q Mr. Swenson, you had explained as part of your initial contact, maybe the first moment you saw the defendant at the top of the stairs, you made a comment or in your testimony that he was alive and well. What -- can you clarify what you mean by that?

A Well, 'cuz his sister had informed me that Jerry had contacted his mother shortly before and told his mother that he was -- apparently some things had happened recently in his life that was uncontrollable for him, that he had no control over, and he was distraught about it. And he was sick and tired of life kicking him in the teeth, so **[106]** to speak, and he was done, and he was going to commit suicide. His sister informed me that they had tried to contact him several times, and he was not answering his cell phone.

Q So just to be clear, do I understand that your comment about alive and well is not in reference to his state of intoxication but in reference to whether or not he's still alive and not -- he hasn't already committed suicide.

A Exactly. His sister was very concerned about whether he was really going to do harm to himself or not.

Q Did you ever see him with any alcoholic beverages?

A No.

Q Did you see him get into that van with anything in his hand?

A He did not have nothing in his hand when he got --

Q Are you certain?

A I am a hundred percent positive.

Q And from your viewpoint you talked about kind of the property distance. You said, you know, if you step ten feet you'd go onto your property versus his property. What kind of distance are you making your observation from this porch down to this parking lot area where he gets in his car?

[107] A Fifty feet.

Q Okay. Anything obstructing your view?

A No.

Q Any trees in the way?

A No.

Q May 30th, 3 p.m., light out? Was it light out?

A Middle of the summer. Very light out.

Q Okay.

A Very bright.

Q Mr. Swenson, have you been convicted of crimes before?

A I have.

Q And how many times?

A I believe approximately 12.

Q Okay.

ATTORNEY HABERMAN: Nothing further then.

THE COURT: Cross-exam?

ATTORNEY WINGROVE: Thank you.

CROSS-EXAMINATION

BY ATTORNEY WINGROVE:

Q Just for clarification, Mr. Swenson, that's 12 convictions within the past ten years, correct?

A Yes, sir.

Q Okay. You're currently on probation, correct?

A I am.

[108] Q You're currently in custody at the Sheboygan County Detention Center?

A I am.

Q And the prospects of your future really are in large part at the discretion of your agent, correct?

A It is.

Q Now, when the officer arrived you made a statement to him, right? He asked you what's going on?

A I did.

Q And the officer says that you told him, he shouted out the window to Gerald asking him what was wrong, and Gerald made a vague statement about ending his life because of ongoing difficulties. That sound correct to you?

A It does.

Q Okay. Now today you're saying that you were downstairs at Gerald's apartment and he was upstairs, correct?

A I was at the bottom level of his apartment.

Q Okay. What exactly do you mean by that?

A Well, there's a -- like I say, the only way I know to get into Jerry's apartment is a back door.

Q Okay.

A And I do know there's – it's access to another **[109]** apartment. You walk through the door. You immediately take a right, and there's a set of stairs you go up. There's a door, and you go to Jerry's apartment.

Q Okay. So there's a door. You walk in it. You take a hard right. You walk up a flight of stairs. How many stairs?

A I couldn't tell you. I didn't go up the stairs.

Q Anything unusual about 'em? It's just stairs to a second story in a Sheboygan apartment house?

A Yeah.

Q So --

A Pretty typical two-level apartment.

Q Okay. And there's a door at the top; is that right?

A Yes there is.

Q And you saw him at the top of the stairs?

A Not when I first entered and yelled his name. The door was open, but when I yelled his name, I could hear him up there.

Q Okay. How far away was that?

A From the top of the stairs to where I was at?

Q Please.

A I don't know. However many steps there are.

Q Sure. Fair to say it's a ways.

[110] A Probably 15, 20, maybe 25 feet. I'm not sure. I don't know.

Q Okay. And you said you first smelled alcohol when you first walked into the back door.

A Correct.

Q Okay. And you also said you didn't know where it was coming from, right?

A Correct.

Q Okay. Might it have been coming from the trash?

A Well, the trash is actually outside and probably 20 to 30 feet behind the house.

Q I'm sorry. I thought under direct you said you didn't know where it was coming from. It could have been coming from the trash?

A Oh it could have been 'cuz there's a neighbor down there.

Q So fair to say it might have been that.

A It could have been.

Q Okay. So you're down the stairs. Jerry's up the stairs. And when the cops first got there, you didn't think to tell them about any of this, did you?

A About . . .

Q The fact that it was -- well, initially what you told the cop was you shouted out the window to ask [111] Jerry what was going on, and he made vague statements about ending his life. And now --

A I didn't make that statement to no police officer.

Q Okay.

A Maybe off the balcony at one time 'cuz I do believe I had said something to Jerry when he was getting in the vehicle.

Q Okay. So if the officer testifies that his report says he shouted out the window --

ATTORNEY HABERMAN: Judge, I'm going to object. He's already answered any question's going to come from this, and that's he didn't tell the officer that. That was already in the question of Attorney Wingrove.

THE COURT: I thought the first question was phrased in a way that was difficult to understand. I don't mind if Mr. Wingrove rephrases the question in the context of what's in the officer's report. I think that would be more solid than the way the question was originally phrased.

BY ATTORNEY WINGROVE:

Q What the officer's report says is that you told him -- it says he, but that's referring to you. (As read) "He shouted out the window to Gerald asking him

what was wrong, and Gerald made a vague statement about ending his life because of ongoing difficulties."

[112] A I don't understand where the officer would make a statement about shouting out the window. No window was even in the whole scenario.

Q And it's fair to say you didn't really want to get involved in this, did you?

A I'll say it still till today.

Q Directing your attention to December 3, 2013, did you talk to anybody about this case?

A December 3rd?

Q December 3, 2013. Do youremember someone named Jamie Schnell?

A Oh, I do. Private investigator that you had contact me.

Q Sure. And you told her you didn't want to get involved, right?

A I'll say it still till today.

Q And initially you had no idea you were a witness in anything, did you?

A I had no clue.

Q And initially when she asked you about Gerald Mitchell, you didn't know what she was talking about, did you?

A I did not know him by that name, by Gerald.

Q Sure.

A And I did not actually know what his last name was **[113]** till

Q Okay.

A -- recently.

Q I'm sorry. Go ahead.

A I did not know what his last name was till recently.

Q Sure. And it's fair to say you told the PI you were trying to avoid process, right?

A I did.

Q And when I say trying to avoid process in other word to say that you were ducking subpoena?

A I did.

Q So according to the story, you had this interaction with Gerald Mitchell. You decide to go smoke a cigarette. You're up in the balcony 50 feet away from the van, right?

A Correct.

Q Jerry comes out the back door, right?

A Correct.

Q And you're testifying today -- well, where was the van parked in relation to the back door?

A The back door of whose apartment?

Q The back door of Jerry's apartment.

A Five feet.

Q Okay.

[114] A Five feet from the back of his -- his apartment sits right here (indicating). Our apartment sat right here (indicating). Directly right next to each other.

Q I have a copy of a aerial photograph prepared by the State. And there's some red boxes on it.

A Correct. I see 'em.

Q And this one red box is marked 1125.

A I see it.

THE COURT: There's a reference, ladies and gentlemen, to this photo. Does anybody have a difficult time seeing it? If you do make sure you let me know please.

And Mr. Wingrove, if you're going to refer to that, there's an easel over here with some clips on it that might be of assistance. It should probably be marked as an exhibit.

BY ATTORNEY WINGROVE:

Q Before we mark this as an exhibit, I want to talk about what it is for a minute, okay.

A Okay.

Q And you're familiar with the area of Eighth and St. Clair in Sheboygan, Wisconsin; is that right?

A I am, sir.

Q You've lived there, right?

A I have.

[115] Q And in fact, this building marked 1125, is that where you were living?

A It is.

Q And there's this building marked 723. Is that where -¬

A It is.

Q Okay.

THE COURT: You said is that and then he answered. The question should be completed 'cuz I don't know what that is.

ATTORNEY WINGROVE: Thank you, Judge.

BY ATTORNEY WINGROVE:

Q There's a building in a red square marked 723. And is that where Gerald Mitchell resided?

A Yes it is.

Q Okay.

ATTORNEY WINGROVE: I'm not sure what's going to please the Court, but I want to have him identify --

THE WITNESS: Where I was at?

BY ATTORNEY WINGROVE:

Q Yeah. I'm going to take a orange highlighter, and if I could ask you to come down and just make a dot.

A (Complying.) There is a balcony that sits on the second floor. You can actually see the balcony.

[116] Q Just make a dot where the balcony was. There we go. Don't go away please. Please take this. And you saw Gerald Mitchell get into a van, correct?

A Yes I did.

Q Please just make a very small line where the front of the van was.

A (Complying.)

Q Just like that. Now let's take a red pen and mark where the front door was -- back door, I'm

sorry, the back door of 723, the door you saw Gerald Mitchell come out of.

A (Complying.)

Q Now please take this blue pen and draw in where the body of the van was.

A (Complying.)

Q Thank you.

ATTORNEY WINGROVE: At this point I would ask this be marked as Exhibit 1 and received.

THE COURT: Corrie has the sticker, Mr. Wingrove. If you would want to take the sticker and put it on. Thank you.

BY ATTORNEY WINGROVE:

Q So Mr. Mitchell walked from the back door to his van, correct?

A No. He walked from the back door to -- there's [117] another vehicle you can see in the square of where Mr. Mitchell's van is. There's a -- what appears to me a white vehicle parked there. That is approximately the same location as where they put their trash. It would be in the lower left-hand corner of the square box.

Q So you saw him walk out there. And how long did it take him?

A I don't know. A minute or two. He was carrying what appeared --- what I thought was trash.

Q Sure. And what did he do with the trash?

A He had put it into the trash.

Q And what did he do next?

A He turned around and headed back towards the direction of his apartment.

Q Okay. And what happened next?

A He got in his van.

Q Which side?

A The driver's side.

Q Okay. And you know if there was anything in the van? Did you look in the van earlier that day?

A No.

Q Okay. When you were down allegedly going into Mr. Mitchell's apartment, you didn't look in the van then either, huh?

[118] A No.

Q Now, so you were at the balcony when he stepped out the back door with the trash smoking a cigarette, right?

A I am on the balcony smoking a cigarette, right.

Q Okay.

A I am actually on the phone with Javier at that time.

Q I'm looking -- you made a statement to the police on May 30th, correct?

A If that was the day of the incident.

Q Yeah. So let's back up for a second. You're absolutely sure you're on the balcony when you saw him come out the back door, right?

A I am.

THE COURT: Mr. Swenson, are you able to see Mr. Wingrove with the easel placed as it is?

THE WITNESS: Kind of. I can hear him fine.

THE COURT: It's probably easier for communication if there's eye contact also. If you could move the easel, Mr. Wingrove.

ATTORNEY WINGROVE: Permission to approach the witness?

THE COURT: Yes, sir.

[119] BY ATTORNEY WINGROVE:

Q So you made a statement to the police on the day in question, correct?

A I did.

Q And just handed you a statement.

A The statement I had made.

Q Okay. At the time you made this statement was it true and accurate?

A To the best of my knowledge it was.

Q Okay. Now, I'm going down and I'm going to read part of the statement to you, okay? And I want you to follow along with me. (As read) "I asked him if he was okay. He told me to fuck off and live him alone. I asked him if he called his mom, and he told me to -- told me fuck this world, he was done. I at that time stepped out his back door and he also came out with a bag of trash."

A That's when I had -- when Jerry come down the stairs upon the first contact, I removed myself from his property, from his home, and put myself back onto the property that I belonged in.

Q "Jerry started to walk to the trash bin and he almost fell." You said that in your statement, right?

A I do believe I did.

[120] Q So on May 30th you tell the police you were talking to Jerry. He comes out the back door with a bag of trash. And today you testify you're up on the balcony smoking a cigarette when he comes out with the bag of trash.

A I was on the balcony. When Jerry got in his vehicle I was, in fact, on the balcony.

Q I'm talking about when he came out the back door with the bag of trash. You said two different things now.

A When he come out the back door and I was on the telephone with his sister, he had a bag in his hand. At that point in time I don't know if he set the bag down and focused on me and his sister. I was on the telephone with his sister. I removed myself immediately -- I told him -- I told the sister on the phone to contact somebody. I was waiting for prior arrangements. He was alive and well. I would contact one of the other roommates, let them know what was going on. And I was done with the situation.

I walked back around the building. On Exhibit A where it says Eighth Street where it says 1125, you can see there's a gap in between the buildings right there. I walked back around to the **[121]** front of our apartment and immediately went upstairs and went out back to smoke a cigarette.

I don't know if he had -- when I had seen him walk with the trash bag, it's possible he could have picked the trash bag up from by his door and walked it out to by where the other vehicle is and put it down and turned around and go get in his vehicle.

Q Okay. So now -- earlier you said you saw him come out the back door with the trash bag when you're on the balcony and put it in the trash. We all know you said that.

A Right.

Q Now you're saying he came out the back door with the trash bag, maybe he set the trash bag down. You went down the alley around to the front of the building back out to the balcony. How long did that take?

A A minute.

Q And when you're there with the officer initially when you made your first statement, you saw him come out the back door with the trash bag and he started to walk to the trash bin. That's what you said, right? That's what your statement says, right?

[122] ATTORNEY HABERMAN: Judge, I object. It's a compound question. He's asking two different questions.

THE COURT: Well, if --

ATTORNEY WINGROVE: Okay. I'll break it down.

BY ATTORNEY WINGROVE:

Q That's what your statement says, correct?

THE COURT: You know what he's referring to, Mr. Swenson?

THE WITNESS: No.

ATTORNEY WINGROVE: You want me to come up?

THE COURT: If you'd show him what you're referring to.

THE WITNESS: I have it right here.

THE COURT: He did find it.

ATTORNEY WINGROVE: Okay. Great.

THE COURT: You want the question repeated?

THE WITNESS: Yeah. Please.

BY ATTORNEY WINGROVE:

Q Your testimony earlier today was you saw him come out of the back door with the bag of trash. He had nothing in his hands. He walked and put it -- the bag of trash -- in the trash bin, and he walked to his van, right? You remember saying that a few minutes ago?

[123] A That he had nothing in his hands?

Q Yeah.

A I was asked by the district attorney if he had anything in his hands when he got in his vehicle. He did not.

Q Sure. Obviously he had something in his hands when he walked to the trash.

A Obviously that's a trash bag. That's different from walking to the vehicle and to the trash can.

Q Sure. Now, what you said is when he came out the back door and he may have set it down, and you walked around the alley to the front of the building and back up to the balcony?

A I can tell you when he knew I was on the phone with his sister, he was very pissed off at me and --

Q Could you answer the question please?

ATTORNEY HABERMAN: Judge, I think he is. If Mr. Wingrove would give him a moment.

THE COURT: Go ahead and finish your answer.

THE WITNESS: I didn't know at that point in time whether he was going to directly come at me in a physical manner, but I was immediately taking myself out of the situation. My back was turned by the time Jerry had probably got to the bottom stair, and I was hanging up on the phone with his sister because I no longer wanted to be **[124]** involved with this situation whatsoever.

This was none of my business. I didn't want to be involved, and I was removing myself from the situation. I don't know at that point in time if he set the bag down in the door, by the door and turned around 'cuz he yelled at me a couple times as I'm walking away. He apparently must turned around and went back to his -- the back door of his apartment.

BY ATTORNEY WINGROVE:

Q How do you know that?

A For whatever reason. Because when I went into the apartment and upstairs to the balcony and I had come out on the balcony and answered Javier's phone call, he was coming out again the back door of his house with the bag of trash in his hand going to the trash bin. There's a --

THE COURT: Why don't you wait for the question, sir?

And Mr. Wingrove, I want to break for lunch in the next few minutes. When you get to a break in

your cross, let me know, and we'll take a break at that time.

ATTORNEY WINGROVE: I would say we're at that point now.

THE COURT: Ladies and gentlemen, it's ten past 12. I want to start at quarter past one. Keep in mind **[125]** what I said earlier. You're not sequestered, so if you want to go leave and go home or run an errand, you can do it. Make sure you're back here please in the jury room at about ten minutes past one so we can start at 1:15. Thank you.

(The jury leaves the courtroom.)

THE COURT: It's about 12:10. The jury's out of the courtroom.

Mr. Swenson, you can step off the stand.

We'll take a break. Start again about quarter past one.

COURT CLERK: Are we not marking things today?

THE COURT: We'll mark it.

ATTORNEY WINGROVE: I was going to ask that be received and that be marked.

THE COURT: We'll mark it. Anything else to take up before we break?

ATTORNEY WINGROVE: No.

THE COURT: One thing I noticed is the date in Count 2 is wrong. It makes reference to him, meaning Mr. Mitchell, driving on June 26th. I think that's easily corrected. Is there any objection, Mr. Wingrove, if Count 2 is amended to reflect that the date of the offense was May 30th?

ATTORNEY WINGROVE: For the record I'll argue **[126]** they're stuck with whatever was said when the jury was impaneled. I understand the Court can rule otherwise.

THE COURT: I can always amend the Information to comport with the proof. All the evidence today is going to be about May 30th. So -- and I'm looking at the stipulation that you two presented to me, and it makes reference to May 30th being the date of the blood draw. So I'll make the amendment to Count 2 to reflect that that did occur on May 30th and not June 26th.

ATTORNEY WINGROVE: Thank you.

ATTORNEY HABERMAN: Judge, thank you. I apologize. I looked at that Information and tried to see if there were any problems with it. Sorry.

THE COURT: That's all right.

(Lunch recess.)

(The jury returns to the courtroom.)

THE COURT: The time is a quarter past one, and the jury's back in the courtroom.

And Mr. Swenson, you're still under oath. You won't be sworn in again.

And ladies and gentlemen, we'll take break in another couple hours. And as I mentioned before, if anybody wants to take a break between now and then, it's okay to raise your hand and tell me. And also if there's a break between witnesses, if you want to stand up and stretch that's **[127]** permitted too.

With that, Mr. Wingrove, you may continue.

BY ATTORNEY WINGROVE:

Q So let's go to you're upstairs on the balcony smoking a cigarette when Jerry takes the trash out?

A Yes.

Q Okay. I look to your statement and it says (as read), "Jerry started to walk to the trash bin and almost fell. I asked him if he was okay again, and he got very upset."

A Yes. I do believe at one point in time when I was upstairs I did say something to Jerry as he was walking. I don't exactly remember what it was.

Q And you would have been 40 or 50 feet away from him when you said that, right?

A Approximately, yeah.

Q As I read the officer's report, it says Alvin contacted police. Is that what happened?

A No. I contacted one of the other roommates. The other roommates contacted another third party which informed him to contact the police. When Javier called me back, he told me -- he did inform me that he did contact the police, and they were en route to contact me.

Q So you didn't contact the police. Do you think you **[128]** told the officer you did contact police?

A No, not at all. They already knew who the contact person was.

Q Now, you said your experience with knowing intoxicated people from watching other people who were intoxicated and your own intoxication, right?

A Correct.

Q Okay. Have you had any experience with medication issues?

A No.

Q Okay. Have you ever seen someone on psychotropic medication when their medications weren't adjusted properly?

A I don't understand --

Q Okay.

A -- what kind of medication you're asking about.

Q Okay. Thank you for the clarification. Some people when they suffer from emotional disorders, such as depression, they're put on medications. And sometimes those medications aren't properly administered to the person, or they have to change their dosage. Have you ever had experience dealing with anybody in those situations?

A Not to my knowledge. I don't know. I'm not a medical professional. I don't know. I could have [129] and not known it. I don't know.

Q So it's fair to say if that situation presented itself, you really wouldn't know what you were seeing, would you?

A Absolutely not.

Q And when you're done here today, you go back to the jail, right?

A Correct.

Q And then you learn what the DOC has in store for you.

A Correct.

ATTORNEY WINGROVE: No further questions.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY ATTORNEY HABERMAN:

Q Mr. Swenson, let me talk to you a minute about the fact that you're on supervision. What, if anything, do your rules tell you about cooperating or testifying in court?

A My stipulations on my supervision rules are I have to cooperate with any courts, law enforcement agency a hundred percent.

Q Does that -- if your agent would find out or be informed that you were lying in any way, would that be considered cooperation?

[130] A Absolutely not.

Q Are you -- do you know if you would be in more trouble if you lie than if you wouldn't?

A I would be under jeopardy to be revocated.

Q If you tell the truth and if you do not lie, what, if anything, do you know about your future?

A I would not be breaking no rules of my supervision.

Q Okay. Attorney Wingrove was able to bring out Exhibit 1, which is this map. I'm going to bring this closer to you, Mr. Swenson. We're going to talk about it in a little better, maybe easier-to-use context.

ATTORNEY WINGROVE: If I may, Judge, I'm going to ask permission to come around so I can see.

THE COURT: You may.

BY ATTORNEY HABERMAN:

Q Can you see it?

A I can.

Q All right. Can you still see it?

A Yes, sir.

Q Mr. Swenson, come on up to the map and use your finger to point and hold it where you have indicated the porch is. And you drew that for Attorney Wingrove using that orange marker.

A The balcony would be approximately right there. **[131]** You can actually see the shadow of the porch right there.

Q Okay. Hold your finger there for just a moment.

A (Indicating.)

Q You're pointing to basically the middle of the red box in which the numbers 1125 are in the middle.

A Correct.

Q Okay. And just while we're on the map for a minute, point with your finger where the defendant's vehicle was parked.

A Right here (indicating).

Q And that's basically in the middle of the red box where 723 are the numbers inside of it.

A Correct.

Q And is there anything obstructing your view from seeing that vehicle?

A No.

Q From the porch.

A No.

Q And the front door is just -- point to the front door -- or the back door where you saw the defendant leave from I should say.

A It would be right directly in front of where the vehicle was parked, probably approximately five feet.

[132] Q And now -- and that's marked on the map already with a little red line.

A It is.

Q And point with your finger where the trash bags, where the trash pile was.

A You can actually see -- in the corner you can actually see trash cans. There's another vehicle at the rear end of the driveway. You can actually see where the trash bins are right here.

Q And your finger is in the lower left corner of the red box with the number 723 in the middle.

A Correct.

ATTORNEY WINGROVE: For the record I'm going to object. This is repetitive.

THE COURT: I agree.

ATTORNEY HABERMAN: I'm going to offer some clarification questions on it. I think they were foundationally necessary, but I'll move on, Judge.

THE COURT: Move on.

BY ATTORNEY HABERMAN:

Q You can have a seat, Mr. Swenson. If I understand your testimony correct earlier, you resided at 1127 North Eighth Street, right?

A Yes.

Q And what can you tell me about the building itself **[133]** you resided in? Is it just an apartment complex, or is it more to it?

A There's several businesses and actually a Christian community, like, a bible study hall, Christian community gathering. There's to my recollection a pizza parlor, a vacuum shop, the Christian community, and the apartment.

Q So do you know whether or not there are multiple address numbers for that particular building?

A There is definitely.

ATTORNEY WINGROVE: Objection. Relevancy.

ATTORNEY HABERMAN: Judge, that's why I'm going to clarify what the map is. So it's not irrelevant.

THE COURT: I think we're getting close to beating a dead horse to be honest. I think you ought to think about what you need to establish and get it done.

ATTORNEY HABERMAN: I'll move on, Judge.

BY ATTORNEY HABERMAN:

Q Mr. Swenson, when you described what you observed earlier on your testimony, Attorney Wingrove talked about a couple different, as he described it, kind of versions of your statements. When you were at the top of the stairs -- excuse me -- when you were at the bottom of the stairs looking up and you saw the defendant at the top of the stairs when you **[134]** first saw him, did he have a garbage bag in his hand?

A He did.

Q All right. The next point in time is when the defendant starts walking down the stairs. Are you inside or outside at that time?

A I'm half inside, half outside looking directly at him.

Q When he's walking down the stairs, do you know if he has the trash bag in his hand or not?

ATTORNEY WINGROVE: I'm going to renew the objection to repetitive.

ATTORNEY HABERMAN: Judge, Attorney Wingrove went on what he describes as inconsistencies, so I'm trying to establish what's consistent in his testimony.

THE COURT: Just go ahead.

THE WITNESS: When Jerry took the first step towards me coming down the stairs, he did have a bag in his hand. And I immediately removed myself from his property. I backed up out of the door.

And you can see where the property line splits. You can see on the picture there's a alley between the buildings. And I went to the other side because it was now on our property. I didn't know the gentleman. I didn't know if he was going to try to get physical or if he was just being **[135]** verbal because he didn't want me there. And he, in fact, knew I was on the phone with his sister. I made that clear.

BY ATTORNEY HABERMAN:

Q So the next point you're at roughly going into this alleyway area-ish.

A Right.

Q Do you know where Jerry was at that moment, the defendant was?

A Not exactly, no. Closer -- he appeared 'cuz I'm walking. I got my back to his residence. It would appear that he would probably be closer to coming out the door or maybe even already on the stairs coming out the door 'cuz I can hear him yelling at me.

Q Okay. So are you actually able to see him at this point?

A I had my back to him.

Q Okay. So do you know whether or not he had a trash bag with him at that moment?

A No.

Q When you next saw the defendant, I understand, is when you're on your porch making the observation?

A Correct.

Q And at that moment what are you seeing him doing?

A He's coming down the stairs. I couldn't tell you **[136]** how many stairs, maybe two, three stairs to his thing walking his trash to the trash can.

Q Are these the exterior stairs, not the interior ones you were talking about?

A Correct. It was already from his door frame to the ground level.

Q Okay. And -- Mr. Swenson, have you told the truth today?

A I have.

ATTORNEY HABERMAN: I have nothing further, Judge.

THE COURT: Anything new for recross?

ATTORNEY WINGROVE: Very few questions, Your Honor.

RECROSS-EXAMINATION

BY ATTORNEY WINGROVE:

Q When you made your statement to the police on May 30, 2013, did you tell the truth then too?

A I did.

Q Okay. And your testimony today is you were walking back to the residence with your back turned to Mr. Mitchell, right?

A Excuse me?

Q When Mr. Mitchell first came out of his residence, you were walking back to your residence with your **[137]** back turned to Mr. Mitchell, right?

A The first time when I was in the process of hanging up with the sister, yes.

Q Sure. And he was saying things to you, and you were afraid he was going to jump you, right?

A No. I'm not saying that. I just -- I wasn't going to allow myself to be in a situation because I don't know the gentleman. I don't know what he's capable of. I have, you know, very minimal contact with this man in just a couple day period of time.

Q Okay. And you're also telling the truth on May 30th when you said to the police -- when you said in your statement to the police at that time stepped out of his back door and he also came out with a bag of

trash. Jerry started to walk to the trash bin and also almost fell. That was the truth too, right?

A To my best knowledge, yeah.

Q Okay. And your understanding is if you cooperate with the prosecution today things may go more favorable for you in probation?

A No.

Q No?

A That has never been brought to my attention, absolutely not.

[138] Q A few minutes ago didn't you testify about cooperating?

A I did. It's in my probation rules.

Q Okay. And if you violate your rules what happens?

THE COURT: I think we're going beyond the scope.

BY ATTORNEY WINGROVE:

Q Okay. What's your understanding of cooperation?

THE COURT: I think we're going beyond the scope of redirect.

ATTORNEY WINGROVE: Okay. I'm done. Thank you.

THE COURT: Thank you, Mr. Swenson. You can step down.

Next witness please.

ATTORNEY HABERMAN: Thank you, Your Honor.

The State will call Carol Mitchell.

**** CAROL MITCHELL, ****

called as a witness, having been first duly sworn, was examined and testified as follows:

COURT CLERK: Please state your name and spell your last name.

THE WITNESS: My name is Carol Mitchell.

Last name spelled M-I-T-C-H-E-L-L.

THE COURT: Go ahead please.

[139] DIRECT EXAMINATION

BY ATTORNEY HABERMAN:

Q Ms. Mitchell, where do you live?

A In Muskego.

Q Okay. And that's down in the --

A Southwest of Milwaukee by about 15, 20 miles.

Q Okay. And how long have you lived down in that area?

A Forty-eight years.

Q And roughly how old are you?

A I just turned 73 yesterday.

Q Really. Well, happy birthday I think. It's a hard way to spend it I know.

A Yeah.

Q You know the defendant?

A I do.

Q And what's your relationship to him?

A He's my son.

Q On May 30, 2013, did you speak to the defendant by telephone?

A I don't know whether it was May 30th. I can't remember the date. But I talked to him the end of May sometime. He called me on his cell phone.

Q And what did he tell you?

A He called me to say goodbye.

[140] Q And what, if anything, did that mean to you?

A I thought possibly he was going to die because he had nowhere to go except here.

Q And did you notice anything about his tone of voice and the way he talked to you?

A He was a little slurred, but I don't know why.

Q Okay. Did he have any sort of tone to his voice that you would recognize with any sort of feelings that he has?

A Nothing other than that he loved me and he wanted to -- his last words to say to me.

Q Based upon his statements what were you concerned about?

A I was concerned he was going to die. I was distressed.

Q Okay. And what happened next then?

A After our conversation -- I can't remember the rest of it. I tried to keep him on as long as I could. I did ask him where he was because I planned to call other people to try and find him in time.

Q Okay.

A Because at that time he was alive.

Q Okay. And when you spoke to him, once that conversation was over, did you speak to other family members, any other family members of yours?

[141] A Yes.

Q Okay. And how did the phone call end? Did everyone say goodbye and the phone hung up?

A No. No. We kind of lost the call. And then I tried to make other calls, like, to the Police Department. And I misdialed all the time, so I asked my daughter to call to get him some help.

Q Okay. And was your daughter with you at your house?

A Yes.

Q Okay. When your -- did you see your daughter call people?

A I can't remember.

Q Okay. On May 30th or around the end of May of 2013, what vehicles, if any, did you -- did the defendant have access to that you know?

A He had my silver van.

Q Okay. And what kind of van is it?

A It's a Dodge 2000 Sport.

Q And that's a minivan.

A Caravan Sport.

Q Caravan Sport. Is that a minivan type vehicle?

A Yes.

Q And do you know the registration, the license plate number?

[142] A The registration, no, but the license plate number I remember clearly.

Q What was it?

A Because it was weird. It was 404-BTN. At first I thought it meant British thermal units, but that didn't go with. It just stuck there. I'm a scientist. What can I say.

Q Fair enough. When was the last time you saw the van before the end of May?

A The last time I had been up to visit him.

Q Do you know roughly when that was?

A No. It was within a month or two.

Q And at that time did you actually see the van?

A Yes.

Q And did you notice any damage at that time to the vehicle?

A I noticed the mirror on the driver's side was broken.

Q Can you describe it?

A No. Just broken.

Q Did you notice any other marks nearby that?

A No. Didn't look for any either.

[143] Q Did you and the defendant go anywhere in the van? Did you use the van?

A Pardon?

Q Did you and the defendant go anywhere in the van or did you drive the van?

A Not that I can remember.

Q When you spoke to the defendant on the phone, did you notice any signs that he might be intoxicated?

A I've heard him when he was intoxicated years and years ago, so I know what that voice sounds like. And it sounded similar or on account of meds he had taken.

ATTORNEY HABERMAN: Okay. Nothing further then, Your Honor.

THE COURT: Cross-exam.

CROSS-EXAMINATION

BY ATTORNEY WINGROVE:

Q Few questions, ma'am. I'll try to keep this short. I know this must be unpleasant for you. You spoke to Jerry and had a troubling conversation sometime late May of 2013, correct?

A Yes.

Q And you said he sounded strange. Have you ever seen Jerry when he was having a reaction 'cuz his meds weren't properly titrated?

A Yes. I think I have.

Q Did he sound like that?

A Similar.

[144] Q Now, do you know how this van got from St. Clair to -- back to the apartment?

A Yes. I drove it.

Q Okay.

A This is after he was taken to the hospital.

Q Sure. And where did you find the van?

A I found the van at the end of St. Clair facing the opposite of the lake. So that would be west. And I drove it back to his apartment.

ATTORNEY WINGROVE: Permission to approach the witness?

THE COURT: You may.

BY ATTORNEY WINGROVE:

Q I'm going to hand you some photographs that have been labeled Exhibit 4 and Exhibit 5.

THE COURT: I'm sorry. Mr. Haberman, have you seen those exhibits?

ATTORNEY HABERMAN: Yes, Judge. I know they're discovery photographs.

ATTORNEY WINGROVE: I offered him copies too.

THE COURT: Thank you.

BY ATTORNEY WINGROVE:

Q Can you identify that vehicle?

A That looks like my van because I recognize the stickers in the front window that I placed there **[145]** for Muskego County Park. It looks like it, but I can't tell for sure because I don't see the license plate on here.

Q Sure. And if you look at I believe it's Number 4, there's some scuff marks to the left-hand side of the van?

A Okay. I see 'em now.

Q Do you have any belief as to how they got there?

A Jerry had told me that this happened.

ATTORNEY HABERMAN: Judge, I'm going to object. That's a hearsay statement.

THE COURT: What's the relevance of the scuff marks?

ATTORNEY WINGROVE: I anticipate there may be some suggestion that the damage to the mirror and the scuff marks on the side of the van were occurred on May 30th.

THE COURT: Well, the question was brought up on direct, but I agree the explanation would be hearsay.

THE WITNESS: Should I answer that then?

ATTORNEY WINGROVE: No.

THE COURT: That's fine, ma'am.

BY ATTORNEY WINGROVE:

Q Were you surprised to see the scuff marks on the side of the van?

A No.

[146] ATTORNEY WINGROVE: No further questions. Thank you, ma'am.

THE COURT: Any redirect?

ATTORNEY HABERMAN: No.

THE COURT: Ma'am, thank you very much.

THE WITNESS: I'm done?

THE COURT: You're free to stay for the rest of the trial if you'd like.

ATTORNEY WINGROVE: I'd ask that 4 and 5 be received, Your Honor.

THE COURT: They're received. In fact, if there's no objection, all marked exhibits will be received thus far.

ATTORNEY WINGROVE: Thank you.

THE COURT: Mr. Haberman, your next witness.

ATTORNEY HABERMAN: State will call Officer Alexander Jaeger. Judge, I don't intend to recall Ms. Mitchell at all. I don't know if --

THE COURT: It's a fair question what you're getting to. Mr. Wingrove, are you going to call Mrs. Mitchell?

ATTORNEY WINGROVE: No, Your Honor.

THE COURT: All right. So if she's not going to be called, then she's not sequestered, and she can stay in the courtroom.

[147] ATTORNEY WINGROVE: Thank you.

**** OFFICER ALEXANDER JAEGER, ****

called as a witness, having been first duly sworn, was examined and testified as follows:

COURT CLERK: Please state your name and spell your last name.

THE WITNESS: Officer Alex Jaeger,

J-A-E-G-E-R.

THE COURT: Go ahead please.

DIRECT EXAMINATION

BY ATTORNEY HABERMAN:

Q Officer, how are you employed?

A City of Sheboygan police officer.

Q And how long have you been a police officer with the City of Sheboygan?

A With the City for almost five years.

Q Do you have other law enforcement experience?

A Yes. I have approximately three years with the Sheriff's Department here in Sheboygan County as a patrol deputy.

Q So about eight total years in law enforcement?

A Yes.

Q Describe your education, training, and your background prior to becoming a police officer or sheriff's deputy.

[148] A I have a two-year associate's degree accompanied by state academy certification from Northeast Wisconsin Technical College.

Q And did you receive some specific training for being a police officer?

A Yes I did.

Q Just briefly describe that.

A We have hands-on training as well as classroom training. Training from report writing, professional communications, firearms, arrest tactics, driving skills.

Q And do you have any specific training in relating to identifying people who might be under the influence of alcohol?

A Yes I do.

Q And describe that training for the jury please briefly.

A It's going to be training through the degree that I was a part of. And it was hosted by or run by the National Highway Traffic Safety Administration. There are standardized tests that are used throughout the country by officers to indicate whether or not somebody is impaired to operate a motor vehicle.

Q And did you pass your training in relation to field [149] sobriety tests for indicating impairment?

A Yes I did.

Q And did you receive certification as a result?

A Yes I did.

Q And was that back during your education phase prior to becoming a law enforcement officer?

A Yes it was.

Q And how many roughly operating while intoxicated investigations have you been a part of?

A I've been a part of most likely several hundred.

Q What shift do you typically work?

A Either night shift or afternoons.

Q How frequently in those shifts do you come in contact with dunk drivers?

A Several times a month.

Q And how frequently do you deal with intoxicated persons on that shift?

A Could be several times a shift, multiple times during my workweek.

Q Every time you conduct an investigation into someone for OWI, do you arrest them every time?

A No.

Q And what happens in those cases?

A In those cases either the operator is allowed to drive away as probable cause or elements of the **[150]** offense were not met. A taxi could be offered to somebody or other arrangements for a ride from the scene of the stop.

Q In the cases that you don't arrest them, what, if any, sort of observations have you made about their ability to safely drive or their level of impairment?

A I'm sorry. Can you repeat the question?

Q Sure. You know, in those cases that you don't arrest someone, what have you observed generally about them that leads you to not make an arrest?

A Basically their ability to multitask during both the instructional phase or the performance phase of the standardized tests that are administered. Oftentimes they don't provide enough clues or indicators of impairment, and your suspicion is not enough to make the arrest. And they are often released.

Q Okay. As part of your life experience, have you observed people -- and now this is not when you're a cop on duty -- in your general life experience have you come in contact with people that are intoxicated?

A Yes.

Q Do all intoxicated people act the same?

[151] A No.

Q What are some of the signs that you frequently see?

A It varies from vomiting, becoming quite ill. Some are unable to speak clearly, their words are slurred. They sometimes have greater difficulty in walking or following directions or, you know, even maintaining a conversation. They might drift off and be easily distracted.

Q Do these signs that you have seen, are they present every time you see an intoxicated person?

A No.

Q Have you received any sort of training regarding driving behaviors that might be indicative of impaired driving?

A Yes.

Q Tell me about that.

A Things like swerving within their lane of traffic, stopping at a green light, speeding, driving very slowly, anything that might cause an accident sometimes is of concern. Basically it's a result of not being able to multitask, receiving information being that there's a stop sign ahead of me or a traffic signal that tells me I need to do something, or not being able to follow through with that actual stop sign or coming to a stop. Their **[152]** attention is divided, and they have a difficult time focusing on receiving that information and performing what's been asked of them.

Q And do you always encounter this driving behavior that's consistent with impaired driving in every OWI case that you investigate?

A No.

Q Why is that?

A Sometimes it's reported by a witness who's willing to make a statement to police about the driving behavior. Other times it's a result of a motor vehicle crash where we get there after. Somebody's driving and they've since crashed, and we're now investigating it. Other times it's an issue where you end up seeing them getting out of a vehicle and they are stumbling and, you know, having difficulty walking, maintaining balance.

Q So let me direct your attention then specifically to Thursday, May 30, 2013. Were you working that afternoon?

A Yes.

Q Do you remember what shift you were working?

A Second shift, or afternoon shift.

Q So directing your attention to 3:17 p.m., did you receive a dispatch to 1127 North Eighth Street in **[153]** the city and county of Sheboygan, state of Wisconsin?

A Yes I did.

Q And what was that dispatch in regards to?

A It was a check welfare complaint.

Q And what information had you received about that situation you were going to go to?

A Male subject later identified as the defendant had made some telephone calls to family indicating that he was possibly going to attempt to harm himself or end his life by some means.

Q And why specifically 1127 North Eighth?

A That's where the complainant was at.

Q And where -- did you arrive at that address?

A Yes I did.

Q Can you describe this area for the jury?

A It's a upstairs apartment shared by several subjects.

Q And this building itself, does it have multiple addresses listed on it?

A Yes it does.

Q Whom, if anyone, did you speak with when you got there?

A Alvin Swenson.

Q Describe the nature of your contact with him.

[154] A Alvin was very excited. He seemed very concerned about some information he had received that the defendant was potentially suicidal and that he had just seen the defendant driving away from his apartment in a vehicle.

Q Did you take -- did you sit down and speak with him? Or tell me about how you got information from him.

A Based upon the fact that Mr. Swenson had told me the defendant appeared intoxicated, was making suicidal statements, and was apparently behind the wheel of a vehicle, I needed to obtain the information very quickly. There's some exigency there to relay information to other officers so that we can quickly intercept the vehicle or somehow make contact with the defendant to prevent him from harming himself or others.

Q And as a result do you take a formal written and recorded statement from him?

A No I don't.

Q Tell me about the type of information or generally what you're trying to get out of him.

A What I'm trying to get is basic information that includes vehicle description, the description of the defendant, the type of condition the defendant [155] was in at the time that the witness had seen him, and any other factors such as the stumbling and falling that was observed by the complainant.

Q In this -- when you spoke to Mr. Swenson did you speak to him inside or outside?

A It was inside.

Q And where inside this apartment did you speak to him?

A In a common area, like, a dining room area I think it was.

Q Okay. And where in relation to the whole building is this common area that you're speaking to him in?

A Right about in the middle.

Q Okay. And as you're speaking to him there, do you have him complete a written statement at that moment?

A Not at that time.

Q What do you do after getting some information from Mr. Swenson?

A Mr. Swenson takes me to the windows that are on the east side of the building, and he kind of gives

me a brief layout of where things were at the time such as the vehicle, the garbage, and where Mr. Mitchell had been seen walking and driving away from. I was able to confirm that the van that was **[156]** reported that he had left in was not there at this time, not that it had returned home and parked in the same area between the time that we received the police call and the time that I arrived and started talking to him.

Q Let me stop you there, Officer. How did you confirm that the vehicle was not back, that it hadn't returned?

A I looked through the window, and I did not see it out there.

Q Okay. When you were speaking to Mr. Swenson, were you in the room that you were in, did it have windows to see the back area?

A Yes it did.

Q Okay. Could you see the parking lot of the other residence?

A Yes.

Q Are you familiar with what the address of that other residence is?

A 723 St. Clair Avenue.

Q And that's also in the city of Sheboygan, Sheboygan County, Wisconsin.

A Yes it is.

Q After you have taken the statement from -- the brief statement from Mr. Swenson and after you have **[157]** checked out the window, what, if any, information do you gather from other sources?

A I begin looking in our in-house database. It's a system in our computers that we use to locate prior contacts with people, potentially vehicle descriptions, more than just a gray van is what I had already been given. I was trying to look for a license plate that we might have had a previous contact with the defendant in that vehicle. And I eventually made phone contact with Carol Mitchell.

Q And did you have an opportunity to actually speak to her?

A Yes I did.

Q And did she provide you the license plate or registration for the vehicle?

A Yes she did.

Q And what was that? .

A 404, "B," as in boy; "T," as in Tom; "N," as in Nora.

Q Officer, I'm going to show you what's been marked now as Exhibit 6. Can you identify that please?

A This is a certified copy of Vehicle Details from that vehicle owned by Ms. Carol Mitchell.

Q And who is the source of this information in this exhibit?

[158] A The State of Wisconsin Department of Transportation.

Q And what does it say about the vehicle plate and its registration?

A It describes it as a 2000 Dodge. Provides the vehicle's specific VIN number, that it's registered to Carol Mitchell, provides her address in Muskego, and

the license plate of 404-BTN. And it also says the expiration or the registration is current through April 30th of 2014.

ATTORNEY WINGROVE: If I might interrupt for a minute. We would stipulate to the admission of that document.

THE COURT: All right. Thank you.

BY ATTORNEY HABERMAN:

Q Officer, on the second page of that does it indicate the most recent color of the vehicle details?

A Yes it does.

Q And what is that?

A Gray.

Q Okay.

ATTORNEY HABERMAN: Your Honor, given the stipulation, I just move for that admission into evidence.

THE COURT: It's received.

[159] BY ATTORNEY HABERMAN:

Q Is that consistent with the information you received from your computer records check?

A Yes.

Q And what, if anything, did you do with this information?

A I provided the information to other officers asking them to check the area for this vehicle, again, in an attempt to intercept it before any harm could be done.

Q What time was the original dispatch in this case?

A 3:17 p.m.

Q And what -- you seem pretty specific on that time. Tell me about how you're so specific at 3:17.

A When a call comes in to police dispatch, a case is generated on our computer system that we use. And there's time stamps that go along with that.

Q Is 3:17 a fair indicator of what time you arrived at the 1127 address, or is there -- did you arrive sometime after that?

A That's the time that the call would have been dispatched on the screen. Probably would have taken me five to ten minutes to get there.

Q Do your -- once you ultimately got to the residence, you spoke to Mr. Swenson, you spoke to **[160]** Ms. Mitchell, you made your observations about the parking lot, and then you check this registration and you communicated it to officers, about how much time had passed?

A Including the contact I had with Mr. Swenson?

Q Yes.

A Maybe a half hour. Maybe a little more.

Q So we're roughly at about 3:45.

A Somewhere in there, yes.

Q Okay. Maybe a little later than that.

A Correct.

Q What happens after you're putting this information out?

A While I'm putting this information out, I receive information on the police radio from one of our community service officers who was also in the area both attempting to locate the vehicle and doing his normal duties. He informed me that he observed a male subject in the area on foot approaching our location. He seemed to be possibly bothering a female pedestrian.

Q And what, if any, observations did you then make?

A I then got out of my car and walked in that direction, and it was right on -- little east of the corner of North Eighth Street and St. Clair [161] Avenue. And I observed a male subject wearing dress shoes, jeans, no shirt, and some type of ball cap walking towards 723 St. Clair Avenue.

Q Which direction was that male party walking?

A Sort of south, southeast, kind of at an angle.

Q Okay. And what street were -- did you observe them walking on?

A Pretty much at the intersection of North Eighth Street and St. Clair Avenue. More specifically on the northeast corner.

Q Officer, we do have Exhibit 1 which is our map. As a City of Sheboygan officer, are you familiar with the streets in the general area?

A Yes I am.

Q As you look at that map today, Exhibit 1, does that appear to be a fair and accurate representation of the street and building layout?

A Yes it does.

Q Officer, I'm going to give you a green marker. I'd like you to just come down and indicate where, if at all, your squad car was parked when you originally made contact with Mr. Swenson, and then we'll pick up from there. And indicate with a "PC" for police car where you would be, and draw it a little bit and bold it in a little bit for us too.

[162] A (Complying.) Right about here on North Eighth Street facing southbound parked on the side of the street.

Q So you're basically across the street from where you were taking the report.

A Yes.

Q And are you in your squad car when you get the radio communication from your community service officer?

A Yes I am.

Q And where do you make your first observation of where the -- this male person is?

A I exited my car here and began walking on foot as I had been radioed by the community service officer that the subject was walking in this area. Figured it would be easier for me rather than turning around my car and maneuvering around traffic just to get out on foot and made contact with him in the roadway right about here.

Q Will you indicate maybe a star where you initially made your contact with him. Again, make sure it's nice and bold so we don't have any difficulty seeing it.

A (Complying.)

THE COURT: Just for the record that's just **[163]** to the east of Eighth Street and St. Clair Avenue; is that correct?

THE WITNESS: Yes.

THE COURT: Just a little bit south of the sidewalk on the north side of the street?

THE WITNESS: Yes.

BY ATTORNEY HABERMAN:

Q So your contact was actually with the person in the street.

A Yes.

Q What is that business, if you know, just to the north of St. Clair? What's right on that corner there?

A Right here there's a large funeral home facility.

Q Okay. You can have a seat again back up there. I'll take the marker back.

When you made contact with this male individual that was walking, what, if any, signs did you observe to indicate whether or not that person had been drinking?

A Immediately before even making contact with him I could see him walking. He was appearing to stumble. His arms were quite, I guess, droopy and kind of bouncing as he walked. And as I continued to make direct personal contact with him, I could **[164]** smell the very strong odor of intoxicants on his breath. As I began to identify myself and ask him who he was, his words were very slurred and thick tongued.

Q Who is that person that you made contact with?

A Gerald Mitchell.

Q Do you see him in court?

A Yes I do.

Q Can you describe what he's wearing and where he's seated for the jury?

ATTORNEY WINGROVE: We'll stipulate again that the witness has already identified Gerald Mitchell.

THE COURT: All right. Thank you.

BY ATTORNEY HABERMAN:

Q What, if any, significance did you place on your observations about his demeanor?

A He was quite hostile towards police. When we were trying to ask questions about who he was and where he was coming from, he was quite belligerent. Several vulgarities were used, not specifically at me or anybody in general but just in conversation I guess.

Q And did these observations and demeanor that the defendant displayed, did it indicate anything about his level of intoxication?

[165] A I felt his level of intoxication was very high based on the walking that I had observed, nearly stumbling. And in fact, when I initially made contact with him in the roadway, I asked that we step out of the roadway, and we actually went to the southern sidewalk of St. Clair Avenue. And he nearly tripped over the curbing from the street to the sidewalk.

And at that point, again, I could smell the strong odor of intoxicants. His eyes were very red, glossy, and bloodshot. His speech was very slurred, and it

appeared he had difficulty in maintaining balance. At some points he would sort of take several steps backwards kind of holding his arms out to the side a little bit trying to maintain his own balance while standing on a fairly level city sidewalk.

Q And, you know, are these observations pretty typical for an OWI investigation, or do your observations range in any way?

A They vary quite a bit. He was at the higher scale of the spectrum as being very intoxicated based on my training and experience.

Q Did you notice any gray minivans in the area that matched the description you were looking for?

[166] A No, I did not.

Q Did you speak to the defendant specifically?

A Yes.

Q What did he say?

A I asked if he had been drinking anything since he drove his van, and he told me he had not. He told me he was drinking in his apartment but would not tell me who he was drinking with or if he was with somebody.

Q Did he indicate anything about where his vehicle was?

A He told me he left his van down by the beach as he figured he was too drunk to drive.

Q Did he make any statements to you or did you ask any questions about whether or not he was drinking near the lake?

A He said he had not had any alcoholic drinks from leaving his apartment till the time he returned home.

Q Till the time he returned home?

A Yes.

Q When did he return home?

A When I made contact with him there. He was right out in front of his apartment there.

Q Okay. What significance, if any, do you place on **[167]** his statements?

A It showed that he had not consumed intoxicants in the roughly half-hour period that he had been gone from his residence according to Mr. Swenson's statement to me. It was roughly about a half hour, maybe a little bit longer. But he was quite intoxicated, and it would be very difficult to be that intoxicated in that amount of time where he would have had to consume a lot of intoxicants --

ATTORNEY WINGROVE: Objection. Foundation.

THE COURT: Sustained.

BY ATTORNEY HABERMAN:

Q Officer, when you observed his demeanor and you couldn't find the van, what, if any, efforts did you make to locate his van?

A Again, several officers had been asked to check the area for it and did subsequently find it on St. Clair Avenue in the 300 block.

Q Did you ask the defendant to perform any field sobriety tests?

A Yes I did.

Q And generally for the jury what are field sobriety tests?

A Those are the standardized field sobriety tests that are used typically on the roadside during a **[168]** traffic stop investigation where we feel an operator might be impaired. And these are standardized sobriety tests that are used basically throughout the country.

Q What generally are you looking for when you ask someone to submit to field sobriety tests?

A The first thing I check for is HGN. It's also referred to as Horizontal Gaze Nystagmus, or the involuntary jerkiness of the eyes. Next I do the -- or administer the Walk and Turn Test as well as the One-Legged Stand Test.

Q Why these three specific tests?

A These are tests that have been found to be accurate in indicating whether or not a motorist is impaired to be operating a motor vehicle.

Q And are you taught through your training to use these particular tests?

A Yes I am.

Q And when you're administering these tests, generally what sort of comparisons are you looking for? What kind of observations?

Officer, I want to clarify. I'm not asking you to go into what are the tests and what clues or whatever you're looking for. But generally what are you looking for?

[169] A Their ability to divide their attention between an instruction that's given to them in the performance of the instructions and the tests that were given to them. You know, at the beginning of each individual test, there's what's called the instructional phase position. They're standing with their feet together, told not to move until you're done explaining and demonstrating a portion of the test that you're about to ask them to do. It's a divided-attention test. And typically somebody that's impaired will step out or forget that they're supposed to be in that phase or in that stance that you previously put them in.

Q You characterize these field sobriety tests as a divided attention. What significance does a divided attention test have at all in relation to someone's ability to drive?

A Our divided attention tests, again, have an instruction phase where we give them indications and direct simple statements on how they are to perform the tests. They then take that information and attempt to perform the test the way that was explained and demonstrated for them.

It's very similar to driving down the road. As you're driving you have to be listening **[170]** for audible clues, you know, potentially a siren behind you, a train horn, car horn, something similar to that. You have to pay attention for stop signs, turn signals, vehicles in front of you hitting the brakes, slowing down, speeding up. While you're driving a vehicle you have to be able to multitask, watching, listening, and reacting to what you're observing at the same time.

Q So why -- has -- let me ask you this. In your OWI investigations have people passed field sobriety tests?

A Yes.

Q And if they pass the field sobriety test do you make usually an arrest?

A No.

Q Did the defendant perform field sobriety tests in this case?

A No, he did not.

Q And did you make an arrest of the defendant still?

A Yes.

Q Why did you make the arrest without having the benefit of the field sobriety test knowledge?

A Based on the totality of the circumstances, the defendant's admission to drinking, and his current physical condition not being able to maintain his [171] own balance, inability to speak clearly, simple tasks like walking and things like that were very difficult for him. And he was asked to do the field sobriety tests but did not.

Q Based upon your observations of the defendant as well as your training and experience with OWI investigations, were you able to form an opinion about his condition during your contact with him on that Thursday?

A Yes.

Q What was that opinion?

A I felt that while he was operating a motor vehicle in the short amount of time that he would have been impaired.

Q And what would that, if anything, would that impairment be caused by?

A Most likely alcohol.

Q And why do you say alcohol?

A Based on the odor of intoxicants on his breath and his own admission to drinking.

Q Did he make any statements to you regarding his medication?

A No.

Q Did he ever indicate anything about his medication, taking any medication at all at that point?

[172] A No.

Q Do you know what time he was arrested by you?

A I believe it was 4:26 p.m.

Q And how is it that you have a specific time of 4:26 p.m.?

A When we have somebody in custody we advise our dispatchers on the radio so that they do know we have somebody in custody. And again, that is something that's time stamped into the case.

Q And basically about how long have you had an interaction with the defendant by the time you get to 4:26? If I understand right your original call, your original reported time was 3:17.

A Correct. It would be 20, 25 minutes maybe.

Q And during that entire interaction with the defendant, did your opinion change about his ability to safely operate?

A No.

Q Once he was arrested was he placed in your squad car?

A Yes.

Q And where, if anywhere, did you take him?

A Directly to the Police Department.

Q And what, if anything, did you notice about his condition while in the back of the squad car on [173] your way to the Police Department?

A There wasn't a whole lot of change at that time until we got to the police station.

Q Describe that.

A When we got into the sally port, which is a secure area where we either place our detained subjects in or remove them from our squads, he had difficulty in getting out of the car at that point. He began to be appearing more intoxicated.

Q Did you notice anything more about his physical state at that point?

A He had a greater inability to maintain his own balance, standing upright, or walking.

Q Did you have to use the assistance of any other person at that point?

A Yes. With the assistance of Lieutenant Mittelstaedt.

Q After having contact with him at the Police Department where, if anywhere, else did you go?

A Directly to Memorial Hospital here in the city of Sheboygan.

Q About how far away is the Sheboygan Police Depa-tment from your original scene of Eighth and St. Clair?

A Couple miles.

[174] Q Roughly how long for you as an officer to drive?

A Just a few minutes.

Q Okay. So after you drive from there to the Police Department, about how long at the Police Department for, just roughly?

A Ten, fifteen minutes.

Q And then you drive to the Sheboygan Memorial Hospital.

A Yes.

Q And what's the purpose of taking him to the hospital?

A It's up there that we would continue our investigation with a legal blood draw.

Q And once you got to the hospital, what, if anything, happened?

A His condition seemed to decline. He began to become limp, especially when we got to the hospital. I asked him to come out of the car, and he was so intoxicated it appeared that he was nonresponsive. He wouldn't answer to me. He wouldn't -- it was almost like he was passed out. His head was slumped down. His whole body was very limp. It was pretty much the seat belt and the back seat rest holding him

upright. And again, I needed the assistance of another officer to have **[175]** him come out of the car.

Q Did you ultimately get him out of the vehicle?

A Yes I did.

Q And did you go inside the emergency room area of the hospital at that point?

A Yes.

Q Officer, I'm going to show you what's been marked as Exhibit 7. Can you identify this for the jury please?

A This is the Informing the Accused form attached to this case.

Q And did you read this form to the defendant at the hospital?

ATTORNEY WINGROVE: I'm going to object as to relevancy. We stipulated to the blood draw already. I don't know what we're trying to accomplish with this.

THE COURT: Mr. Haberman?

ATTORNEY HABERMAN: Judge, generally in an OWI trial I do have some foundational requirements to go through the Informing the Accused. That's why I'm doing what I'm doing, Judge.

THE COURT: Well, are you stipulating to the admission of Exhibit 7?

ATTORNEY WINGROVE: Sure.

THE COURT: Okay. They're going to admit to **[176]** that, Mr. Haberman. I think that takes care of your requirements.

ATTORNEY HABERMAN: Thank you. That will speed things up a little bit.

BY ATTORNEY HABERMAN:

Q When you did speak to the defendant, you read the form to him, and you had -- at the end of the form you had to ask him a question?

A Yes.

Q Was he able to respond to you?

A He was not. He was so incapacitated and basically passed out he couldn't respond to me in any way.

Q After you didn't get a response to him, was a blood sample taken from him?

A Yes it was.

Q Okay.

ATTORNEY HABERMAN: Your Honor, I'd ask that the --

THE COURT: If you're looking for the stipulation I have it.

ATTORNEY HABERMAN: I'd ask the Court read the stipulation. It's marked as Exhibit 3.

THE COURT: It's marked as Exhibit 3. And Mr. Wingrove, any objection to reading the stipulation right now?

[177] ATTORNEY WINGROVE: No, Your Honor. Thank you.

THE COURT: Ladies and gentlemen, I'm going to read to you a -- verbatim a stipulation that was arrived at by Mr. Haberman and Mr. Wingrove and Mr. Mitchell.

On Thursday, May 30, 2013, at approximately 4:26 p.m. the defendant was placed under arrest for operating a motor vehicle under the influence of an intoxicant by Officer Alexander Jaeger of the Sheboygan Police Department in the city and county of Sheboygan, state of Wisconsin.

On Thursday, May 30, 2013, at approximately 5:59 p.m. the defendant had a sample of his blood drawn at the Sheboygan Memorial Medical Center in the city of Sheboygan by Jennifer Gatzke. Ms. Gatzke is qualified to perform the blood draw. Ms. Gatzke properly labeled and sealed two vials of the defendant's blood into blood draw kit.

Three, after the blood draw was completed Officer Jaeger received the defendant's blood samples within the blood draw kit from Ms. Gatzke. Officer Jaeger placed the blood draw kit into the outgoing mail at the Sheboygan Police Department for it to be mailed through the United States Postal Service to the Wisconsin State Laboratory of Hygiene in Madison, Wisconsin, for testing.

On June 3, 2013, Lorrine Edwards, an ethanol analyst **[178]** with the Wisconsin State Laboratory of Hygiene in Madison, Wisconsin, received the defendant's blood sample in the United States mail. On June 3, 2013, Analyst Edwards tested the blood evidence for the presence of ethanol. Analyst Edwards is properly trained and qualified to perform analysis on blood samples to detect the presence of ethanol.

Based on Analyst Edwards' analysis, the final results were 0.222 grams per one hundred milliliters of ethanol within the defendant's blood. Analyst Edwards' results are true and accurate to a

reasonable degree of scientific certainty. These results were reported in a laboratory report dated June 4, 2013, for specimen number 13FX008700.

The lab report dated June 4, 2013, for specimen number 13FX008700 is relevant and admissible in this jury trial.

And that is signed by Mr. Haberman, Mr. Wingrove, and Mr. Mitchell.

Mr. Haberman?

ATTORNEY HABERMAN: Thank you, Your Honor. I will also have marked the lab report that was referenced by that stipulation. And that is being marked as Exhibit 8. And with that stipulation, we're just offering it into evidence as well.

[179] BY ATTORNEY HABERMAN:

Q Officer, when you originally had been assigned this case, were you operating with the assistance of any other officer?

A I had other officers checking the area.

Q Was anyone else near or on scene with you?

A Officer Fickett.

Q And what was -- was he a backup officer to you?

A Yes.

Q Okay. Did you give him any particular assignments?

A He was to obtain further information or written statement from Mr. Swenson.

Q Why would you have Officer Fickett obtain information from Mr. Swenson when you already have obtained information from Mr. Swenson?

A The information that I originally obtained was just the basic facts that I could obtain the quickest because I had a great deal of concern for Mr. Mitchell's personal safety as well as the safety of the public. I was informed that he was potentially suicidal and may have an intent on harming himself and furthermore was possibly operating while intoxicated based on Mr. Swenson's original statement to me.

Q The streets in the city of Sheboygan specifically [180] near St. Clair that's depicted in Exhibit 1 on the map, is that a public road?

A Yes.

Q Does that public road continue through the existence of St. Clair, in other words, in each direction of the map?

A Yes it does.

Q Okay. The general streets around the city of Sheboygan, are all of those public roads as well?

A Yes.

ATTORNEY HABERMAN: No further questions, Your Honor.

THE COURT: Ladies and gentlemen, if anybody would like a break now we can do an early one. Otherwise we'll wait until cross-exam is done for Officer Jaeger. Again, if anybody wants to stand up and stretch feel free to do it now before we start on cross-exam.

The comment I'm going to make is not at all reflective of the trial, but I always find myself about 2:30 in the afternoon on a jury trial needing to stand up and stretch. If anybody wants to do it, feel free to do it. I'm glad there's at least one person who feels the same way I do. With that, Mr. Wingrove, whenever you're ready you can commence with cross-exam.

ATTORNEY WINGROVE: Thank you.

[181] CROSS-EXAMINATION

BY ATTORNEY WINGROVE:

Q As a police officer it's important to make accurate reports, correct?

A Yes.

Q And you would say is your recollection -- do you know when you wrote your report on this incident, your first report? About the same day?

A Yeah.

Q Okay. And was your recollection of those events better when you wrote the report or are they better now? Or is it better now? I'm sorry.

A It's roughly the same.

Q Okay. I'm looking at page 3 of 9 in your report at the second full paragraph. And you're talking to Alvin Swenson. And your report says (as read), "He said that he immediately went to the window, looked outside to the parking lot, and saw Gerald getting into the gray van and that he drives after throwing a bag of garbage into a pile in the backyard." Do you have any reason to dispute that?

A The way the report is written is because I obtained the quickest information with the basic facts to continue with my investigation.

Q And it's your testimony today that that was [182] accurate, right?

A Yes.

Q That's what Mr. Swenson said to you, right?

A Yes.

Q Okay. And then it goes on to say (as read), "He shouted out the window to Gerald asking what was wrong, and Gerald made a vague statement about ending his life because of ongoing difficulties." That would be correct too, right?

A I believe so, yes.

Q Okay. (As read) "Alvin said he contacted the police, and just prior to our arrival Alvin had left the area in a gray van." That's what your report says, correct?

A Yes.

Q And it's really a mistake. You didn't mean to say Alvin, you meant to say Gerald left in a gray van.

A Yeah. That would be the case.

Q Sure. Now, when you spoke to Alvin Swenson did he say that he saw Jerry consume any alcohol?

A No.

Q Did anyone think to look in the trash bags?

A No.

Q Now, we had a preliminary hearing in this matter, and you testified at the preliminary hearing.

Your [183] testimony was true and accurate to the best of your ability, correct?

A Yes.

Q And I think you've already been asked this, but you're familiar with the streets of Sheboygan, correct?

A Yes. Most of them.

Q I'm going to ask this be marked as an exhibit. I'm putting up what's been marked as Exhibit 9. Can you identify that?

A It appears to be a aerial photograph of the specific location we're speaking of and the surrounding neighborhood.

Q It's consistent with your understanding and impressions of downtown Sheboygan?

A I would say so, yes.

Q Okay. What I'm going to ask you to do is come down and mark Mr. Mitchell's residence with the

letter 1.

A Mr. Mitchell's?

Q Yes. Please.

A (Complying.)

Q Now, in your report you said the car was located on Michigan, but in fact, the car was located on the 300 block of St. Clair, correct?

[184] A That's correct.

Q And could you mark with an arrow facing which direction the car was pointed about or was located on St. Clair if you know?

A Somewhere in this area right here facing west (complying).

Q Okay. Now at the preliminary hearing you were asked -¬

THE COURT: What page are you on?

ATTORNEY WINGROVE: Starting at page 19, line 25. So I believe this would have been State's direct.

BY ATTORNEY WINGROVE:

Q (As read) "Okay. And how -- and actually just before you saw him you said that he was walking back from further north towards Eighth, right?

"ANSWER: Just north of our location, yes.

"QUESTION: Okay. How far is that from the defendant's apartment?

"ANSWER: About a half block I think 'cuz it was -- I believe it was the alley just north of the funeral home that's right there. Eighth and St. Clair is where he was observed by our community service officer."

So could you with a letter 2 mark the **[185]** area just north of the funeral home that's right there?

A (Complying.) I'm sorry. Which specific location are you asking me to identify?

Q The line of questioning was when you first became aware of Mr. Mitchell. And the answer was "about a half block I think 'cuz it was -- I believe it was the alley just north of the funeral home that's right there."

A Somewhere in this area right here is where our community service officer would have said he saw him walking.

Q Could you put a number 2 there.

A (Complying.)

Q Thank you.

ATTORNEY WINGROVE: I'll ask that 9 be received.

THE COURT: Any objection?

ATTORNEY HABERMAN: No.

THE COURT: It's received.

BY ATTORNEY WINGROVE:

Q Now, when you first spoke to Jerry Mitchell did you record the conversation?

A No.

Q Why not?

[186] A It's not a common practice to record conversations with people.

Q Okay. And you asked him where the van was, and he said I parked it by the lake. I figured I was too drunk to drive, right?

A Correct.

Q Okay. And then you said I asked him if he had been drinking down at the lake or if he had been drinking intoxicants after his left his apartment. And he replied twice no.

A Correct.

Q You would agree that's kind of a compound question, wouldn't you?

A That question was asked separately of each other, those two questions.

Q So your report is inaccurate as to what you -- the question you asked him.

A I wouldn't say my report is inaccurate. I would say my report indicates the questions that were asked and the response provided by Mr. Mitchell.

Q And you went on to indicate that Gerald then told you he had consumed alcohol down by the lake; is that right?

A Later on in my investigation.

Q Sure. How much later in your investigation?

[187] ATTORNEY HABERMAN: Judge, I'm going to object at this point. It's a hearsay statement.

THE COURT: Well, I think it's a reasonable question. The question essentially is when did he tell you he was drinking. That's reasonable.

THE WITNESS: Can you repeat the question?

BY ATTORNEY WINGROVE:

Q Sure. I'll start back up. He did eventually tell you he was drinking down by the lake, right?

A He had changed his story, yes.

Q And how far into the conversation with him were you when he said that?

A I believe this was closer to my squad car.

Q Okay. And when you were speaking with Mr. Mitchell was he coherent?

A Somewhat, yeah. He was sometimes hard to understand, but he was understandable.

Q Somewhat coherent, somewhat not, right?

A Yes.

Q And was he belligerent?

A At that specific time, no.

Q You arrested Mr. Mitchell at 4:26, correct?

A Yes.

Q And if I told you that I've reviewed the DVD of your interview of Mr. Mitchell in front of the **[188]** squad car and it lasts seven minutes and 23 seconds, do you have any reason to dispute that?

A Can you repeat the question?

Q Sure. You interviewed Mr. Mitchell in front of the squad car, by the squad car, correct?

A Yes.

Q That was recorded, correct?

A Some of it was, yes.

Q Yeah. And if I told you we reviewed that DVD of that interview and it lasts for seven minutes and 23 seconds, you'd have no basis to dispute that, would you?

A If that was what was on the video, no.

Q Now, you didn't have Mr. Mitchell perform field sobriety tests, did you?

A I had asked him to.

Q And he declined, correct?

A Several times.

Q Sure. And that was sort of indicative of the whole discussion by that point, wasn't it? It was kind of adversarial?

A I'm not sure what you mean.

Q Okay. Why do you typically conduct field sobriety tests?

A To gain information based on standardized field **[189]** sobriety tests and known indicators of intoxication, assisting in making arrest decision.

Q And that's because you need probable cause to arrest somebody, right?

A Yes.

Q So you ask Mr. Mitchell if he was drinking alcohol by the lake after he left his apartment, correct?

A Yes.

Q Okay. Did you ask him if he went back to his apartment after he left the lake?

A No.

Q So for all you know as you sit here today Mr. Mitchell drove down to the lake, parked his van, had something to drink, walked back to his apartment, drank something in his apartment, and then went for another walk and was walking around the corner through that alley when public safety officer or the community service officer first became aware of him?

ATTORNEY HABERMAN: Judge, I would object. He's assuming facts that aren't in evidence. He's speculating.

ATTORNEY WINGROVE: I'm asking him what he knows. I'm also reading from page 22 of the transcript of the preliminary hearing.

[190] THE COURT: Let me look at page 22.

ATTORNEY WINGROVE: If the Court would prefer I could go into the series of broken down questions on page 23.

THE COURT: That's okay. You can repeat the question. That's in the preliminary hearing transcript, and it was asked.

BY ATTORNEY WINGROVE:

Q So for all you know as you sit here today he drove down to the lake, meaning Mr. Mitchell, parked his van, had something to drink, walked back to his apartment, drank something in his apartment, and then went for another walk, and was walking around somewhere north of Eighth Street when you became aware of him.

A There's a possibility.

Q Now, there was some time when you were knocking on his apartment door, correct?

A Yes.

Q And nobody answered, correct?

A Correct.

Q But when you went to talk to Mr. Mitchell he was really hostile, wasn't he? That's what you testified to, preliminary hearing transcript page 23, lines 22 through 23.

[191] A I attempted contact at his residence, and there was no answer.

Q I'm just going to read this. (As read) "You said he was really hostile when you went to talk" --

THE COURT: You should give the page and the line number.

ATTORNEY WINGROVE: I'm sorry, Judge. I know I should do that.

BY ATTORNEY WINGROVE:

Q Page 23, lines 23 through 24. (As read) "You said he was really hostile when you went to talk to him. He didn't like the officers.

"ANSWER: Okay."

Is that correct?

A Yes.

Q So actually your interactions with Mr. Mitchell were he was hostile, they were unpleasant, pretty much from the beginning according to what that just said.

A Who's they?

Q Referring to your interactions with Mr. Mitchell.

A Okay. I'm not understanding your question. I apologize.

Q Okay. I'm sorry. Let me try to reask the [192] question. Reading from the transcript, you said --

THE COURT: Can I interrupt? Rather than repeating the preliminary hearing testimony, you should ask him what his testimony is today. And then if you need to use the prelim testimony to counter that you can. But you should get his impression as of today.

BY ATTORNEY WINGROVE:

Q Okay. When you first went to talk to Mr. Mitchell, was he hostile?

A Not immediately. Not until we started asking questions.

Q Okay. So when you first started questioning Mr. Mitchell he was hostile.

A Yes.

Q Okay. You've been trained in doing interviews with criminal suspects, correct?

A Yes.

Q Okay. And isn't one of the things that you do when you interview criminal suspects is ask them questions, the same question different ways?

A At times, yes.

Q And don't you look for inconsistencies in the answers?

A Yes.

Q And isn't that indicia perhaps that they're not **[193]** telling the truth?

A Potentially, yes.

Q Isn't that really what your training suggests if there's significant inconsistencies?

A Yes.

Q Now, did you do some follow-up with the hospital? I'm sorry. Did you do some follow-up with Sheboygan Memorial Hospital regarding Gerald Mitchell?

ATTORNEY HABERMAN: Judge, I'm going to object. It's going to be, one, beyond the scope of today's trial, and two, there's not relevance.

THE COURT: What's the relevance, Mr. Wingrove?

ATTORNEY WINGROVE: Well, the State asked questions about intoxication and what was the source of the intoxication. The officer testified it was most likely alcohol. And this is going to suggest that it was a combination of other things.

ATTORNEY HABERMAN: Judge, I'm still not sure he's going to get the answer in. It's a hearsay statement.

THE COURT: Do you anticipate that he's going to testify as to his own knowledge or what somebody else told him?

ATTORNEY WINGROVE: He's going to testify **[194]** that it was at some later date that he went to interview Gerald Mitchell at the Sheboygan County Detention Center on 6-15-13 -¬

ATTORNEY HABERMAN: Judge, I don't want Attorney Wingrove to recite what he thinks Officer Jaeger's going to testify about 'cuz then that gives apparently all the information that he wants the jury to hear already in there.

THE COURT: Well, if he conducted another interview with Mr. Mitchell, and that's what I think he's getting at, I think that's relevant.

BY ATTORNEY WINGROVE:

Q I'm looking at page 5 of 9 of a report that you prepared. And it says (as read), "On 6-15-13 upon

returning to work I, Officer Jaeger, found Gerald Mitchell had been incarcerated" --

ATTORNEY HABERMAN: Judge, I'm going to object. There's not a question yet. He can't read just from a report. He's got to ask him a question, and we got to go from there.

ATTORNEY WINGROVE: I'm going to ask him if that's correct.

THE COURT: He's asking a question.

BY ATTORNEY WINGROVE:

Q (As read) "On 6-15-13 upon returning to work I, **[195]** Officer Jaeger, found Gerald Mitchell had been incarcerated in the Sheboygan County Detention Center." Is that -- that's in your report; is that correct?

A Yes.

Q I'm going to read another part of the report next page. (As read) "The hospital indicated that he had been released from their mental health facility to the Sheboygan Police Department on June 6, 2013." Is that correct?

A Yes.

Q After the blood draw was made, do you have any information as to what happened to Mr. Mitchell? He stayed in the hospital, correct?

A Yes he did.

Q And he went -- do you know which ward he went to?

A I believe it was the ICU, or Intensive Care Unit.

Q Any understanding as to why?

ATTORNEY HABERMAN: Judge, I'm going to object. That calls for a hearsay response.

THE COURT: I'll sustain that objection.

BY ATTORNEY WINGROVE:

Q Do you remember what the weather was like on May 30th?

A I believe it was a sunny day. Wasn't inclement **[196]** really.

Q Was it warm? Was it hot?

A I don't recall if it was warm or hot. I remember it being a typical day in May.

THE COURT: So it was snowing?

BY ATTORNEY WINGROVE:

Q So is it your testimony today that you believe when you first spoke to Gerald Mitchell he wasn't being honest with you?

A That's correct.

ATTORNEY WINGROVE: No further questions. Thank you.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY ATTORNEY HABERMAN:

Q Officer, did the demeanor and behavior of Mr. Mitchell change throughout your course of observations of him?

ATTORNEY WINGROVE: I'm going to object. That's already been asked and answered. He went

from being something, and then as soon as the officer started questioning him he became hostile.

THE COURT: I assume that this is going to lead to something, so I'll overrule the objection.

THE WITNESS: Can you ask again?

[197] BY ATTORNEY HABERMAN:

Q Sure. During your contact with the defendant did his demeanor change at various points?

A Yes.

Q You indicated on -- when Attorney Wingrove asked you on cross-examination that at the specific time in front of the squad car he was not being belligerent to you. Was he belligerent at other points?

A Yes.

Q When was that?

A During my initial contact with him when I began asking questions. He was belligerent towards both officers.

Q And when you first were speaking to him, was he in any sort of restraints at that point?

A No.

Q Was there any indication that you had pulled out any sort of weapons on your duty belt or handcuffs in any way at that point?

A Nothing.

Q And was there anything -- were you with Officer Fickett at that time?

A Yes.

Q And did you as officers surround him in any way or [198] try to corral him in any way?

A No. It was pretty much our standard positioning. We have, like, the number one position, number two position, number three position, things like that where officers are -- if I'm in direct contact or officer or I'm making contact with somebody, I'm typically standing in front of that person facing them with my gun sideway standing at just a slight angle to them for officer's safety reasons. And the other officer is typically off to the side of me.

Q Would this have been the general positioning of you, Officer Fickett, and the defendant when you first elicited some statements from him?

A Yes.

Q And that's the statements about driving down and parking his car down there.

A Yes.

Q When he made additional statements to you next to the squad car, what, if anything, had changed at that point?

A At that point he was in handcuffs based on his hostile behavior towards us, his inability to maintain his own balance, and the previous suicidal statements that were made. It's a concern for [199] others as well as the defendant as sometimes people that are suicidal also have other ill intent towards others.

Q So when he made -- when his story changed was he in handcuffs at that point?

A Yes.

Q And you had mentioned that you had a squad camera on your car that was recording some of your contacts with him.

A Some of it, yes.

Q Did it record everything?

A Not everything.

Q Tell me about that.

A When I first made contact I was across the street and out of view of the camera. Typically at that distance our remote microphones for the camera system that are affixed to the dash or the windshield area of our squads wouldn't reach that far. I can activate it remotely. However, it wasn't activated until I was preparing to ask the defendant to perform field sobriety tests.

Q And why would you have activated your camera at about the time you were going to ask him to perform sobriety testing?

A So that those tests could be displayed for the **[200]** courts as they were instructed and performed.

Q In this case though there were no field sobriety tests.

A Correct.

Q Attorney Wingrove gave you a time of seven minutes and 23 seconds about the time that was captured on a squad video. Had you watched your squad video prior to court?

A Yes.

Q And the 7:23, is that from the player counter or just kind of the time of watching the video?

A That I'm not sure.

Q Okay. And the squad camera itself, did it capture your entire contact with the defendant when you're next to the squad car or not?

A No.

Q Okay. So there would have been a longer time than seven minutes that you were actually talking to him at the squad car.

A Right.

Q When someone -- how are you able today, Officer, to recall exactly what the defendant said to you at the intersection when you first approached him even though that wasn't recorded?

A Based on my report and personal memory.

[201] Q What, if any, emphasis did you put on it in your report?

A Some quotations were actually used.

Q What's the purpose of using quotations?

A To mark specific statements made by the defendant that I felt useful in this case.

Q And do you put everything that someone says in quotations at all?

A No. Sometimes things are paraphrased.

Q Okay. And do you recall if you had actually quoted Mr. Swenson's statements in your report to indicate specific things that he exactly said?

A I don't recall specifically with Mr. Swenson.

Q Let me try to ask that in a better way as I think I asked you a bad question there. Do you

actually recall the specific quotes of Mr. Swenson, or do you generally recall what he said?

A I generally recall that.

Q In your report did you quote him, or did you not, or do you need to see your report?

A If I could see my report.

Q Sure. I'm going to just show you this briefly.

ATTORNEY WINGROVE: I'm looking at the report, Your Honor. There's no quotation marks around the sections of Mr. Swenson's statements that I read. We'll **[202]** stipulate there's no quotation marks on the report.

THE COURT: Mr. Haberman, what were you going to ask?

ATTORNEY HABERMAN: Well, I was going to ask that question. So I thank Attorney Wingrove for saving us a little bit of questioning there. I'll move on from that then.

THE COURT: Please.

BY ATTORNEY HABERMAN:

Q Officer, since Attorney Wingrove is willing to stipulate that there are no quotations in Mr. Swenson's statements to you in your report, did you ever mean to quote him?

A No.

Q Is your report indicative of exact phrases specifically that he said to you?

A Exact phrases, no.

ATTORNEY HABERMAN: Nothing further, Judge.

THE COURT: Anything new for recross?

ATTORNEY WINGROVE: A very few things, Your Honor.

RECROSS-EXAMINATION

BY ATTORNEY WINGROVE:

Q I'm looking at your report. And maybe you don't remember, but you write down some questions you **[203]** asked Mr. Mitchell. I don't see quotations marks around those either. Do you believe they would be there? Do I need to show you your report, or perhaps the State can stipulate.

A What questions would you be referring to?

Q Page 3 and page 4.

ATTORNEY HABERMAN: Well, Judge -¬

ATTORNEY WINGROVE: Page 4 top -¬

ATTORNEY HABERMAN: Judge, I will agree that the quotes about Mr. Mitchell's statement, this is not quoted. I asked if he had been drinking out at the lake or if he had been drinking intoxicants after his left his apartment, and he replied twice. That's all not in quotations. But the response --

THE COURT: Well, I think you got to let Mr. Wingrove ask a question before -¬

ATTORNEY HABERMAN: I'm just agreeing -- I'll stipulate so he doesn't have to show him the report.

THE COURT: I don't know where he's going.

BY ATTORNEY WINGROVE:

Q Okay. Was it more or less five minutes from the time you first saw Mr. Mitchell to the time you moved him over to the front of your squad car?

A I would say more.

Q How much more?

[204] A Maybe a little over ten minutes, maybe ten minutes.

Q About ten minutes it's fair to say?

A I would think so.

Q Okay. And how long did you have Mr. Mitchell by the squad car before you activated your recording system?

A I don't recall specifically.

Q Five minutes?

A Couple minutes, sure.

Q Couple. A couple. Is a couple three or is a couple five? What does it mean to you?

A Three to five.

Q Now, you said Mr. Mitchell was more cooperative by the squad car when you're making the recordings, right?

A Yes.

Q Okay. And you repeatedly asked him if he had had anything to drink before he drove, right?

A Right.

Q And he repeatedly said no.

A Right.

Q One last question please. I'm sorry about the exhibit number, but it's the statement from Mr. Swenson. Going to hand you what's been marked Exhibit 2. I'm not going to refer to anything **[205]** that's been written on Exhibit 2, but generally speaking, is that form familiar to you?

A It's a voluntary statement form we typically issue and ask people to complete.

Q Sure. And it identifies the witness and the officer that took the statement, correct?

A Yes.

Q And what officer took the statement please?

A Officer Fickett.

Q And it has his officer number on it, right?

A Yes.

Q And do you have any reason to dispute that that's what happened?

A No.

ATTORNEY WINGROVE: Thank you. No further questions.

THE COURT: Okay. Thank you, sir. You can step down.

ATTORNEY WINGROVE: I would ask that number 9 be received, Your Honor, if I haven't asked that already.

THE COURT: You already moved it in, but it's received.

ATTORNEY WINGROVE: Sorry.

THE COURT: That's all right. And Mr. Haberman, your next witness.

[206] ATTORNEY HABERMAN: I'll call Officer Dustin Fickett please.

THE COURT: Does anybody need a break, or can we keep going before our afternoon break? Everybody is okay?

ATTORNEY HABERMAN: Maybe for scheduling, Judge, I anticipate Officer Fickett and the next officer to be pretty quick.

THE COURT: All right. Thank you.

ATTORNEY WINGROVE: I would concur with that.

**** OFFICER DUSTIN FICKETT, ****

called as a witness, having been first duly sworn, was examined and testified as follows:

COURT CLERK: Please state your name and spell your last name.

THE WITNESS: Dustin Fickett, F-I-C-K-E-T-T.

THE COURT: Go ahead please.

DIRECT EXAMINATION

BY ATTORNEY HABERMAN:

Q Mr. Fickett, how are you employed, sir?

A A police officer with the City of Sheboygan.

(Witness pouring cup of water.)

Q How are you employed, sir?

A A patrol officer for the City of Sheboygan Police.

Q And how long have you been a police officer for?

A Here just under three years.

[207] Q Do you have other law enforcement experience?

A Yes. About six months with the Department of Natural Resources.

Q And were you a DNR ranger?

A Yes.

Q And that's a -- in the same vein of law enforcement?

A Yes it is.

Q Do you have any training on identifying and detecting individuals who might be under the influence of alcohol?

A Yes I do.

Q And generally describe that for the jury.

A A lot of it just comes down with standard field sobriety testing that you have in the technical college system. And that's just simply states of intoxication such as things of the normalcy of smell of intoxicants, you know, the odor of the breath, and then glossy eyes, redness in the eyes, and just the typical behavior, could even be their slurred speech.

Q During the course of your employment how frequently do you come in contact with individuals who are under the influence of alcohol?

A I don't want to say all the time but quite often.

[208] Q And in your life experience have you also in your personal life experience, not on the job, have

you also come in contact with people who are under the influence of intoxicants?

A Yes.

Q And what signs have you typically seen beyond the ones that you've kind of mentioned already?

A Sure. I think for a lot of people it really affects their motor skills for the most part. Your talking, balance, simply walking, even behavior.

Q What do you mean by behavior?

A You know, alcohol obviously affects people in a different way. Some get either very sad, some get very hyper, some get moody. I've seen that as different effects. I guess it's just from person to person.

Q So is it safe to say that everyone doesn't act the same when they're intoxicated?

A Yes.

Q Directing your attention to May 30, 2013, were you working that day?

A I was.

Q And did you assist Officer Jaeger, who's seated to my right here, in an investigation involving Gerald Mitchell?

[209] A Yes.

Q What assistance were you to provide?

A Initially came out as a check welfare call. I came out to simply try to locate Gerald.

Q And eventually what did you do?

A When I first arrived to check the area for Gerald also there was a description of a Caravan that he possibility might have left in. I searched the entire area around where the reporting person called from. Couldn't locate it.

And then when I went back by Officer Jaeger's position, we overheard from a community service officer that a gentleman ultimately being Gerald was having problems walking, troubles with his balance, and we thought based on the information that could be him.

Q Did you ultimately make contact with this individual?

A Yes.

Q And prior to doing that did you assist Officer Jaeger in interviewing any individuals?

A No.

Q Okay. When you made contact with this male individual, did you identify him?

A Yes. Before I initially went there we have a **[210]** computer system that allows us to bring up their information. For Gerald I had a previous booking photo, so I was able to do that.

Q And did you -- the person you made contact with on the street do you see in court today?

A Yes I do.

Q Can you identify him for the Court by what he's wearing and where he's seated please?

ATTORNEY WINGROVE: I'll stipulate yet again that the officer could identify Gerald Mitchell as Gerald Mitchell.

ATTORNEY HABERMAN: Thank you.

BY ATTORNEY HABERMAN:

Q Officer, what, if anything, did you notice about his demeanor?

A Initially when we first came around the corner I observed Gerald having difficulty walking, difficulty holding his balance. Seemed like he was bothering some people. I don't know if there was a funeral that day, but a lot of people were drawing their attention to him, kind of wondering what was going on. And I observed that.

Q And did you get closer to the defendant?

A Yes.

Q What, if anything, did you notice about him [211] further?

A As we got closer we obviously became concerned about is he going to fall over, is he going to hurt himself. I was actually able to hold onto Gerald, and as we walked him back out of the roadway to the sidewalk, you know, being within inches from him, that's when I first smelt the odor of intoxicants.

Q Could you quantify or qualify that odor at all?

A Usually with intoxicants if there's a lot, I mean, it's a strong, strong odor. If you just have a couple, in my experience that we've dealt with people you typically can't smell it. But in this case it was strong.

Q At your initial contact with the defendant were you present during any sort of questioning of the defendant?

A I don't exactly remember the questioning that we first had with him. I just pretty much stood by - ¬my job was pretty much holding him up while Officer Jaeger completed his pat-down. And later on when we walked him back to the squad car, my job was as safety officer is pretty much to stand back, allow Officer Jaeger to do his questioning, and just to make sure nobody else interfered.

Q And did you ultimately get directed to collect a [212] statement or to assist further?

A Yes.

Q And whom, if anyone, did you go have contact with?

A The reporting person. I just can't recall his name.

Q Did you ultimately obtain a written statement from that person?

A Yes.

Q I'm going to show you what's been previously marked as Exhibit 2. Do you recognize that?

A Yes.

Q And what is that?

A That is a written statement completed by Alvin Swenson, along on the bottom my name and my badge number as a witness for collecting it.

Q And is this the person that you're referencing a moment ago?

A Yes.

Q And when you collected the statement from him did you actually talk to him and elicit responses from him?

A No.

Q What did you do?

A Pretty much went up, and typically when we give someone a voluntary statement form, the first [213] question is are you familiar how to fill these out? And he said he was. And I gave him the form to complete.

Q And did you tell him to put anything specifically in the statement?

A No.

Q And did you -- you then obtained the statement from him?

A Yes.

Q And ultimately did you have any further contact with Mr. Swenson that day?

A After collecting the statement, no.

Q When you had the opportunity to speak to Mr. Swenson -- I'm sorry -- you didn't really speak to him, but when you had that opportunity to have that interaction with him and that statement, did you notice any signs that he might be intoxicated?

ATTORNEY WINGROVE: Objection -- never mind. I'll withdraw the objection.

THE WITNESS: I really wasn't looking at him for any of those.

BY ATTORNEY HABERMAN:

Q Okay. And later on in Officer Jaeger's investigation did you provide additional assistance?

[214] A Yes.

Q And what -- where did you provide that assistance?

A At Aurora Memorial Medical Center.

Q And what, if any, assistance did you provide?

A I came up a couple minutes later after Officer Jaeger arrived, and immediately he was drawing my attention to the car. He was saying that Gerald went limp, was unresponsive but breathing, so I immediately ran inside to get a wheelchair in order to bring Gerald in to get help.

Q What observations did you make about him?

A When I came back, same thing as Officer Jaeger described to me. He wasn't moving. He wasn't responsive. We actually had to assist by physically picking him out of the back of the squad car and place him in the wheelchair. And then even on the wheelchair it was difficult keeping his legs from hitting the ground, constantly had to lift them back up, put him back in the wheelchair. Didn't want him to hurt himself.

Q Officer, in your experience not only with your life experiences but also as a -- on the job, have you seen anyone pass out from alcohol?

A Yes.

Q Did you make -- in that scenario when you have made [215] those observations in the past, was anything consistent or inconsistent with your observations of Mr. Swenson [sic] at this point?

A I guess the one interesting thing was typically in that we've had scenarios as well we do the sternum rub. I don't know why, but it always seems to work. And that was something we tried doing even to wake him up. And even in that time he didn't wake up from it. He just pretty much stayed unresponsive.

Q Just so I guess I understand. You're not able to indicate at all why he was unresponsive.

A No.

Q Okay.

ATTORNEY HABERMAN: Nothing further, Judge.

THE COURT: Cross-exam?

CROSS-EXAMINATION

BY ATTORNEY WINGROVE:

Q You mention the sternum rub a minute ago.

A Yes, sir.

Q And you -- I thought I saw you put, must have been your right hand and hold it where -- about over your solar plexus?

A It was my left hand.

Q Your left hand?

[216] A Yes, sir.

Q Over your solar plexus or higher up?

A Just really much on the bottom of the ribs around the stomach area. Give a large area rub.

Q And it's -- and you've had OWI arrests where people pass out?

A Not OWI, sir.

Q Okay. You've had situations where people have passed out due to alcohol intoxication, correct?

A Yes.

Q And then you apply the sternum rub. Does that generally cause them to wake up or not?

A You know, it's a toss-up. Sometimes it does, sometimes it doesn't.

Q How often does it in your experience?

A I've only used it maybe about half a dozen times, sir, and maybe only half of those times.

Q Did you ever do any follow-up with any of those times to see whether the presentation was more complex, perhaps it was poly drug abuse or something like that?

A No, sir.

Q When you spoke to Alvin Swenson -- did you speak to Alvin Swenson?

A No, sir.

[217] Q You just gave him the form?

A Yes, sir.

Q You didn't ask him if he was familiar with it?

A That would be the only question, yes.

Q Okay. Did you say anything about you need to be truthful when you answer these?

A No, sir.

Q And you've been trained in interviewing criminal suspects, correct?

A Correct, sir.

Q And isn't one of the techniques used is to ask the same question over again in different ways?

ATTORNEY HABERMAN: Judge, I'm going to object because of the relevance here.

THE COURT: I'll overrule the objection.

THE WITNESS: Can you repeat the question please?

BY ATTORNEY WINGROVE:

Q Sure. Isn't one of the techniques used in ascertaining whether a suspect is being truthful is to ask them the same question over in different ways?

A I was not taught that technique, sir.

Q Okay. Were you taught to ask the same question over in different ways?

[218] A No, sir.

Q The same question the same way?

A No, sir.

Q Do you look for inconsistencies in somebody's story when you determine whether they're telling the truth or not?

A I look for inconsistencies, yes, but ultimately we hope for the truth in the end.

Q Yes we do. Thank you.

ATTORNEY WINGROVE: I'm done.

THE COURT: Any redirect?

ATTORNEY HABERMAN: No. Thank you.

THE COURT: Officer Fickett, thank you.

And your next witness please?

ATTORNEY HABERMAN: The other officer's grabbing Officer Stephen. The State will call Officer Christopher Stephen.

**** OFFICER CHRISTOPHER STEPHEN, ****

called as a witness, having been first duly sworn, was examined and testified as follows:

COURT CLERK: Please state your name and '

spell your last name.

THE WITNESS: My name is Christopher Stephen,

S-T-E-P-H-E-N.

THE COURT: Go ahead please.

[219] DIRECT EXAMINATION

BY ATTORNEY HABERMAN:

Q Officer Stephen, how are you employed?

A By the City of Sheboygan as a police officer.

Q And how long have you been a police officer for, sir?

A Just over a year-and-a-half.

Q And have you received any training regarding photographing as part of your training to become a police officer?

A Just general training at the law enforcement academy.

Q Okay. And directing your attention to May 30, 2013, were you working?

A I was.

Q And as part of your training at the police academy do you have any training regarding accident investigations?

A I had a course on motor vehicle accidents, and we had different scenarios regarding damage to vehicles and things of that nature, yes.

Q Did you assist Officer Jaeger on May 30, 2013, in an investigation involving Gerald Mitchell?

A I did.

Q What was your assistance that you were to provide?

[220] A Officer Jaeger had asked dispatch to have an officer check the area for a vehicle. It would have been a van, I believe the license plate was 404-BTN, that may have possibly been involved in a welfare check slash traffic complaint that he had been working on.

Q Did you ever locate the actual vehicle?

A I did.

Q Where did you locate it?

A I located it in the 400 block of St. Clair Avenue.

Q And did you communicate this via your radio to the officer?

A I did. I'm not sure if I communicated it over the radio or over cell phone, but I did have contact with Officer Jaeger and informed him where it was located.

Q And did you receive any direction from Officer Jaeger as to what to do next?

A Yes. He had mentioned something regarding a possible accident and that he was conducting an investigation. I photographed the vehicle and also looked for intoxicants inside the vehicle.

Q Did you locate any intoxicants inside the vehicle?

A No.

Q And how did you look inside the vehicle?

[221] A Just with my eyes walking around the vehicle as I was looking for damage. I didn't open up any doors or anything of that nature.

Q Officer, I'm going to show you two exhibits previously marked Exhibits 4 and 5. Look at each of them individually. And do you recognize those?

A Yes.

Q What is Exhibit 4?

A Exhibit 4 would be the front of the van in question.

Q And that's a photograph of the van.

A Correct. Photograph of the front driver's side.

Q And what's Exhibit 5?

A Exhibit 5 would be a photo that I took from the rear depicting the driver's side of the vehicle.

Q I'm also now going to show you Exhibits 10, 11, 12, 13, and 14.

ATTORNEY WINGROVE: Might I be allowed to see those before you present them to the officer?

ATTORNEY HABERMAN: Sure. Sorry.

ATTORNEY WINGROVE: Thank you.

BY ATTORNEY HABERMAN:

Q Officer, I'll show you those same exhibits I just talked to you about. Can you identify Exhibits 10 through 14?

[222] A (Reviewing documents.) Yes.

Q And what are they in total?

A They're various photos of the vehicle in question that I took on said date and time.

ATTORNEY WINGROVE: Just so the record's clear, I have no objection to 10 coming in. 11 through 14, if this is going where I think it's going, I'm going to be objecting as to foundation.

THE COURT: Well, let's see where it's going.

BY ATTORNEY HABERMAN:

Q Officer, these are pictures that you took on May 30th?

A They are.

Q And these are the -- this is the vehicle that you located.

A Correct.

Q And what's the license plate of the vehicle?

A It's a Wisconsin registration 404-BTN.

Q And you took a picture specifically of that registration?

A I did.

Q And that's exhibit what number?

A That's Exhibit 10.

Q What are depicted in the other exhibits that I handed you, 11 through 14 generally?

[223] ATTORNEY WINGROVE: I'm going to object.

THE COURT: Let's have a sidebar.

(Brief discussion held outside the hearing of the jury.)

THE COURT: Go ahead, Mr. Haberman.

BY ATTORNEY HABERMAN:

Q Officer, after you had taken photographs of the vehicle, what, if anything, did you do next in your investigation?

A I looked for an object or vehicle that the vehicle in question could have struck.

Q Did you locate anything?

A I did not.

Q And did you move the vehicle in any way?

A No.

Q Describe how it was parked.

A It was parked on the north side of St. Clair Avenue in the 400 block more towards the east towards the dead end. It was facing westbound.

Q And that location -- we actually have a big map here, Exhibit 9. I'm going to ask you come up off the witness stand and just walk up here and indicate if you can where the vehicle was located. And if there's any markings on the map that help you make your determination let me know.

[224] A It would be located -- I believe it would be located either right here or right here. I'm not -- I would just assume right in this general area, I guess, just before the 400 block of St. Clair Avenue.

Q Hold up again where you're indicating so I can describe. For the record you're using your pen to point to actually where there is a kind of a blue mark on the map. You see that?

A Yes.

Q There's a blue drawing on that map right next to the word St. Clair Avenue?

A Right.

Q And is that a pretty fair and accurate depiction of roughly where the vehicle was?

A Yes.

Q And is that in walking distance of the beach there and the lake?

A I believe that there's a ramp or a staircase that goes down to the lake there, yes.

Q Okay. And so that -- so does that road end right there at the turnaround?

A It does. It's kind of elevated, on a elevation, I guess.

Q In the nearby area just around the vehicle -- you **[225]** can have a seat. Thank you, Officer. In the nearby area surrounding the vehicle, did you notice any cans or bottles of alcohol?

A No.

Q Anything in the street nearby or anything?

A No.

Q Okay.

ATTORNEY HABERMAN: Nothing further then.

THE COURT: Cross-exam?

ATTORNEY WINGROVE: Very briefly.

CROSS-EXAMINATION

BY ATTORNEY WINGROVE:

Q You said there was a turnaround. In fact, that just comes to a blunt end at St. Clair Avenue at the lake, doesn't it?

A Right. You could turn around at the dead end if you wanted to. It's a dead end.

Q Sure. And the parked -- the car -- the van was parked next to the curb appropriately, right?

A Correct.

Q And whoever drove there -- you weren't present when the van was parked, right?

A No.

Q But even though you weren't there, you know that whoever did that had to execute some sort of turn **[226]** to turn the van around or else it would have had to back it down St. Clair being the direction it was parked, right?

A One would assume so.

ATTORNEY WINGROVE: No further questions. Thank you.

* * *

[243] ATTORNEY WINGROVE: Thank you. The defense calls Gerald Mitchell.

**** GERALD MITCHELL, ****

called as a witness, having been first duly sworn, was examined and testified as follows:

[244] COURT CLERK: Please state your name and spell your last name.

THE WITNESS: My name's Gerald Mitchell,

M-I-T-C-H-E-L-L.

THE COURT: Go ahead please.

DIRECT EXAMINATION

BY ATTORNEY WINGROVE:

Q Drawing your attention to May 30, 2013, how were you doing that day?

A That was a terrible day for me.

Q Why? What was going on?

A I was quite depressed. I lost a job earlier in the week.

Q Were you on any medications?

A Yes.

Q What?

A Alprazolam and amitriptyline and others for my blood pressure.

Q The medicines you mentioned by name, why were you prescribed -- you were prescribed those medications, right?

A Yeah. For depression.

Q How were they working for you on the day in question?

A Not too well. Not at all.

[245] Q What does that mean?

A I know in hindsight they weren't working at all.

Q Were they influencing your moods?

A Yeah.

Q How?

A Well, they didn't relieve me of my depression, so I felt depressed.

Q Did they influence your thoughts? Were they not --

A Excuse me?

Q What were you thinking of?

A I was thinking of ending the mental anguish that I was going through.

Q So you developed a plan to kill yourself.

A Yes, sir.

Q And what was your plan?

A To take my medications in my pocket and a fairly large drink down to the lakefront and go there to die in peace.

Q And these medications, they had warnings, do not consume with alcohol, right?

A Yes.

Q At some time did you go down to the lake?

A Yes.

Q Before you went down to the lake, did you consume any beverage alcohol on that day?

[246] A No.

Q So when you went down to the lake, what did you do? How did you get to the lake?

A I drove my mother's van from my residence down to the end of the street that I live on. And I walked down --

Q Let me interrupt for a second. You drove down St. Clair, right?

A Yeah.

Q Did you just park your van, or did you turn your van around? Your mother's van, I'm sorry.

A Yeah. I did a Y-turn at the end of the dead end and parked behind the car that was right in front of my mother's vehicle.

Q And you remember all this, right?

A Yes.

Q And is it fair to say your meds were influencing your ability to remember to some extent?

ATTORNEY HABERMAN: Judge, I'm going to object. It's a leading question.

THE COURT: I'll sustain the objection.

BY ATTORNEY WINGROVE:

Q Was there anything influencing your ability to remember what happened on the day in question?

ATTORNEY HABERMAN: Judge, I'm going to **[247]** object again. He's given the answer in the question he just asked.

THE COURT: I'll overrule the objection.

THE WITNESS: What was the question again, sir?

BY ATTORNEY WINGROVE:

Q Was there anything influencing your ability to remember what was going on on the day in question?

A Yeah. One of the medications that I have definitely affects my ability to remember things.

Q How? How did it affect your ability to remember things? Does it make it better? Does it make it worse?

A It makes it worse. I can't remember a lot of things.

Q Okay. So you park your car -- I'm sorry -- your mother's van on St. Clair. What happens next?

A I walk down to the lake with my drink, a mixture of vodka and Mountain Dew. Continuing down to the lake, I took pills, drank them with my drink. These were my medications.

Q Now, when you say you drank, that was a mixture of vodka and Mountain Dew, correct?

A Yes.

Q And do you know whether it was -- was it less than **[248]** a liter of vodka?

A Yes.

Q About how much vodka do you think it was?

A Maybe half of a liter.

Q Okay. And did you sip it, or did you drink it on down?

A I pounded it.

Q Okay. What happened after that? Did you take the pills?

A Yes, I took all the pills that I brought with me.

Q About how many different pills?

A In the two different medications approximately 40.

Q About how many of each of those pills would you take on a given day if you took them as prescribed?

A One of the medications and maybe four on a bad day.

Q Okay. What happened next?

A I finished the drink, and I ran into the water.

Q What happened next?

A The water was freezing, so I went back to the beach to lay down.

Q Then what happened?

A I said my prayers and prepared to die.

Q Then what happened?

A I got a warm feeling, and I don't remember anything after that.

[249] Q Okay. You've seen copies of photographs of your mother's van that had been presented today as exhibits, correct?

A Yes.

Q Is that consistent with your recollection of where you parked the van?

A Yes.

Q Okay. And you've watched a DVD of your interview with the police on Eighth and St. Clair, correct?

A Yes.

Q And that lasted for about 7:23, correct?

A Yes.

Q Seven minutes, 23 seconds. I'm sorry.

A Yes.

Q You don't know how you got there, do you?

ATTORNEY HABERMAN: Judge, objection. is a leading question again. It's his witness --

BY ATTORNEY WINGROVE:

Q Do you know how you got there?

A After seeing the video I realized I walked there. I don't remember it.

Q Now, when you reviewed the video, you were adamant that you didn't have anything to drink before -- okay. When you reviewed the video, did you take a position as to whether you had anything to drink **[250]** before you drove down to the lake?

A Yes.

ATTORNEY HABERMAN: Judge, you know, I understand that -- when it keeps happening, Judge, he's giving the answer, and then he's asking the question in an open-ended way.

THE COURT: Well, I will object -- I'm sorry -- I'll sustain the objection to the form of the question. I didn't think the form was proper. When you make reference to your position when you viewed the video, I don't know what that means.

BY ATTORNEY WINGROVE:

Q Yesterday you reviewed the DVD of your interrogation by Officer Jaeger, correct?

A Yes.

Q Did you take a position in that interrogation as to whether you drank before you drove down to the lake?

A Yes.

ATTORNEY HABERMAN: Judge, I'm going to object -¬

THE COURT: I'm overruling the objection.

THE WITNESS: Yes.

BY ATTORNEY WINGROVE:

What did you say?

[251] A I drank while I was down at the lake in two different quantities at two different times.

Q And the officer asked you if you drank before you drove down to the lake, right?

A Yes.

Q And what did you say?

A No. I don't drink when I drive.

Q Do you recall the -- whether or not the officer told you that other people had seen you drinking?

A No.

Q We've already asked this. It's going to be my last question. Before you drove down to the lake on the day in question, did you have anything to drink?

ATTORNEY HABERMAN: Judge, I object again. As Attorney Wingrove said asked and answered.

THE COURT: I'll let it stand as a summary question.

THE WITNESS: No, sir.

ATTORNEY WINGROVE: No further questions.

THE COURT: Cross-exam?

CROSS-EXAMINATION

BY ATTORNEY HABERMAN:

Q Mr. Swenson, isn't it true that you've been convicted of a crime before?

A I am not Mr. Swenson.

[252] Q I'm sorry. I apologize for that. Mr. Mitchell, isn't it true that you've been convicted of a crime before?

A Yes.

Q And how many times have you been convicted?

A Four.

Q And that would be within the last ten years. A Yes.

Q Attorney Wingrove asked you on direct examination about you reviewing the squad video that was provided to you as part of this case, right?

A Yes.

Q And you had an opportunity to watch that.

A Yes.

Q And do I understand your testimony that on direct examination you acknowledged having admitted you drank two different quantities down at the lake?

A Yeah. Two different quantities I told him two different times. First time I said two shots. The second time I said maybe possibly four.

Q So just to be clear, when the officer asked you had you been drinking at the lake, according to what you saw on the video, you acknowledged, yes, now I was drinking at the lake, right?

A Yes.

[253] Q And then he asked you how much did you have to drink, and you ultimately came to the number of about two shots, right?

A The first time.

Q And after that it was kind of established that it was vodka.

A Yes.

Q You would agree that a short time later in the video he asked you again to be honest with him, right?

A Yes.

Q And then he asked you how much did you have to drink, and you gave a response that you had four shots, about four shots then.

A That's correct.

Q Okay. And again, we're talking about vodka.

A Yes.

Q What type of vodka do you typically drink?

ATTORNEY WINGROVE: Objection. Relevancy.

ATTORNEY HABERMAN: Judge, it's going to go to his alcohol concentration and his intoxication level.

THE COURT: I'll overrule the objection.

THE WITNESS: A typical 80-proof vodka.

BY ATTORNEY HABERMAN:

Q Okay. Do you have a brand?

[254] A No.

Q Okay. Fair enough. Anything available that's on the shelf, or do you have a -- or do you just not remember?

A I don't remember.

Q Okay.

A That day? No.

Q All right. Where did you make your drink?

A In my apartment.

Q All right. And what did you use specifically to make your drink?

A Like, a large tumbler cup.

Q Okay.

A And I used a can of Mountain Dew and a good bit on the bottom of the bottle, the end of my bottle of vodka.

Q Okay. When you -- tell me about this tumbler glass. Give me a size if you can. Maybe use your hands to gesture. How tall is the cup?

A Like this (indicating).

Q So for the record, Mr. Mitchell has his hands on the witness stand kind of describing a distance between his hands --

A Eight inches.

Q About eight inches he says. And that looks to be **[255]** about right. And about what would be the kind of diameter if you can give me this with your -- actually the circumference with your hands if you can.

A Four-and-a-half inches (indicating).

Q At the top or the bottom?

A At the top. Bottom is smaller.

Q So the bottom gets a little smaller.

A Yeah.

Q Do you know how much alcohol -- I'm sorry -- do you know how much liquid that that glass holds all the way full?

A Between 20 and 30 ounces.

Q And how do you know that?

A Just by judging what a 20-ounce bottle would do. I just put a can in with 12 ounces. The rest was vodka.

Q Okay. So --

A I may not have actually put the vodka in first, and I just poured the soda on top of it till it filled up. I don't know if I emptied the can or not, so.

Q Okay. You remember specifically using a can of Mountain Dew though and not a bottle of Mountain Dew.

A Yes.

[256] Q We're not talking about a two liter. We're not talking about a 20-ounce. We're talking about a normal 12-ounce can.

A Yes.

Q And you had to open it – it's a fresh can. You had to open it, right?

A Right.

Q And when you poured it in there, do you remember any weight to what was left in the can? Do you remember if there was anything in it? Or don't you remember at all?

A Yeah. No. I don't remember actually. But like I said, I had – would add the can after the vodka.

Q Okay. So you add the vodka first. And you said that it was what's left of the bottle.

A Right.

Q What was remaining. What's the bottle -- not the brand 'cuz I agree or you explained you don't remember it, but what's the size of the bottle of vodka that you poured it from?

A I guess what they call a fifth.

Q A fifth. Okay. Describe the bottle for us if you can. Give me a size estimation for me.

A Maybe three-and-three-quarter inches. Three-and-a-half to four inches round.

[257] Q Three-and-a-half to four inches round. About how tall?

A This tall (indicating). Approximately 14 inches, 15 inches maybe.

Q I guess I don't understand what you mean when you say a fifth I guess. Can you describe it any other way?

THE COURT: Well, a fifth is a size of a bottle. It's a size of a liquor bottle. I assume that's what he's referring to.

ATTORNEY HABERMAN: Right. I guess I'm trying to get the picture of what a fifth looks like in my mind that he had there. And I just -- I guess I'm just asking him to clarify a little further.

THE COURT: I mean, a fifth is a fifth is a fifth. I don't know how much more clear it's going to be.

THE WITNESS: It's a typical bottle of vodka.

BY ATTORNEY HABERMAN:

Q Okay. Do you know how much you poured into that glass?

A No.

Q Is your original statement -- excuse me -- is one of your statements of two shots accurate in terms of how much you poured in there?

A No.

[258] Q Is your statement about four shots pouring in there, is that accurate?

A More accurate, yes.

Q Okay. If I say six shots, are we even more accurate, or are we going in the wrong direction now?

A It's probably -- it depends the size of the shot. I don't -- I wasn't measuring.

Q Absolutely. And that's why I guess I'm just trying to get an idea here of what exactly or how

many exactly you put in there. Do you think you put more than six in?

A Could have.

Q Okay. Nine?

A No. I don't think so.

Q Okay. When you went from -- when did you make this drink?

A It was probably quarter to three.

Q And you have a specific recollection of that?

A Yeah.

Q Is there anything that jumps out as to why quarter to three stands out to you? Did you look at a clock around that time? Is there something that stood out to you?

A No, nothing really stood out to me. That was just **[259]** an estimate.

Q Okay. And that's fair. When did you make a phone call to your mom to say goodbye?

A Maybe a little after that.

Q Okay. So you made -- do you specifically recall making the drink first and then calling your mom?

A My memory is a little fuzzy because the amount of medication that I took at the lake, so.

Q Okay.

A You know, it didn't just affect my memory after taking it. It also affects my memory before taking it because it's memory as a whole.

Q Sure. And if you say you don't remember or you're not sure, that's okay.

A I'm not sure.

Q Okay. You do recall calling your mom and saying goodbye though.

A Yeah.

Q All right. Do you recall Mr. Swenson coming over to see you?

A Yeah.

Q Isn't it true that you first saw him when you were at the top of your stairs and he was at the bottom of those interior stairs?

A Yeah.

[260] Q And isn't it true that you had a trash bag?

A Mm-hmm.

Q Yes?

A Yeah.

Q And isn't it true that he actually didn't ascend those stairs to get any closer to you.

A That's true.

Q And isn't it also true that you saw him on the phone?

A Yeah.

Q And he told you he was on the phone with his sister -- I'm sorry -- not his sister, your sister.

A Yeah.

Q Would you agree that you were in an agitated state?

A Yes.

Q Would you agree you were not nice to him?

A Yes.

Q You heard Mr. Swenson testify today that he knew who you were, you know, he knew you but didn't really know you in a long-term any sort of relationship or friendship. Is that a fair characterization of the relationship that you and Mr. Swenson had?

A Yes.

Q You guys knew of each other, and that was about it.

[261] A That's it.

Q So at that point you really had no reason to be angry at Mr. Swenson for anything he did.

A No.

Q Okay. Isn't it true that you then came down the stairs and he left?

A Yes.

Q Isn't it true that you ultimately took that bag of garbage out to your parking lot?

A Yes.

Q And isn't it true that you had a conversation or -- let me backup. Isn't it true that Mr. Swenson was not standing outside in your parking lot area when you did that garbage?

A Yeah. He was, like, in a different parking lot with pavement.

Q Okay. So you recall him still being outside on the ground level when you took the garbage out.

A What are you getting at?

Q What I'm just trying to do is see if I can understand the chronology of events here. So you agree you took out the garbage, right?

A Yeah.

Q All right. When you took the garbage outside to that spot where the garbage is in the parking lot **[262]** area of your apartment, was -- do you recall Mr. Swenson outside?

A I don't recall.

Q Okay. So you're not sure where exactly he was at that moment.

A Right.

Q Do you recall getting into the van after that?

A Yeah.

Q Do you recall not having anything else in your hand at that time?

A I had my drink in my hand.

Q Okay. Did you go back upstairs to get your drink?

A No.

Q Did you have your drink the whole time?

A Yeah. I brought it down when I threw the trash out.

Q Okay. So when you were at the top of the stairs you had your drink in your hand and you had the trash bag in the other.

A Yeah.

Q Okay. You're certain.

ATTORNEY WINGROVE: Objection. Asked and answered.

THE COURT: It's cross-exam. It's a fair question.

[263] THE WITNESS: No, I'm not certain.

BY ATTORNEY HABERMAN:

Q Okay. Do you specifically recall going back upstairs to get your drink, or no?

A I don't recall.

Q Okay. When -- can you see from up there Exhibit 1, which is this first map we were using. Can you see that?

A Yes.

Q All right. Were you able to see at any point during today the markings that Mr. Swenson made on the map?

A Yeah. I took some time to come around and view that.

Q Okay. Is his diagram of where your van was, is that accurate --

A Yes.

Q -- inaccurate, or don't you recall?

A Yeah, it's accurate.

Q When you left St. Clair, or this address where it was parked, how did you get out, and where did you -- which way did you go?

A Well, I did a "U" -- not a U-turn but a Y-turn in my parking lot and went out the alley back behind my place.

[264] Q Towards Seventh or Eighth?

A Actually toward Erie south.

Q Erie, would you agree, is down here at the bottom of Exhibit 1.

A Right. That's south.

Q So is your alley -- you went this -- where did you go if you can recall?

A I did a Y-turn, or a U-turn, just turned around.

And right underneath that larger red box there's an alleyway that goes to Seventh Street. That's the direction I went. So east.

Q Okay. So you went to Seventh Street, on the alley towards Seventh Street.

A Yes.

Q So you didn't stay back here and go onto Erie.

A No.

Q Sorry. I think I misunderstood you then. So from Seventh you go, what, to St. Clair?

A Yeah.

Q Do you go somewhere else?

A No. Just to St. Clair and went down to, like, Third where it ends.

Q Okay. And ultimately this Exhibit 9 where we had an officer mark on here where the van was found, you would agree that's accurate?

[265] A That's where I parked.

Q And do you recall specifically walking down that larger flight of stairs to the beach?

A Definitely.

Q Did you have your drink in your hand at that time?

A Yes.

Q Are you certain of that?

A Yes.

Q Just to be clear, you have a specific recollection of that, right?

A That was the moment of truth.

Q Okay. And you're talking about because of the suicidal -- that was going to be the time that --

A Yes, sir.

Q Okay. Did you have a cap for this drink at all? A cap for your -- a lid for your cup.

A I may have left it in the car.

Q So you do recall having a lid for the cup.

A Yeah.

Q Okay. Did it have a straw too?

A No.

Q All right. You recall using the lid to get from inside your apartment into your car then down to the end of St. Clair.

A Yeah.

[266] Q Is it possible that you spilled at all on the steps on the way down?

A Not with the lid.

Q Okay.

A Some may have came out, like, where there's a straw little "X" mark.

Q Okay.

A But not much.

Q Do I understand that when you're talking about spilling, you didn't spill much, if anything, and that was because of the stairs in your house or the stairs near the beach?

A The stairs in the house.

Q Okay. When you're walking down the stairs at the beach, did you spill anything?

A No. I stood still for a bit while I got the pills out of my pocket and took them in probably four different little handfuls.

Q Okay. So your consumption of the pills and the drink happened at the top of the stairs or at the bottom of the stairs near St. Clair --

A By the lake? Yeah, by the lake. Towards the top.

Q Okay. So it doesn't sound right that you would have walked down the stairs and spilled anything. That couldn't have happened 'cuz it was gone [267] already.

A Yeah. Couldn't have is a stretch. Could have. Could have. But I don't remember spilling anything.

Q Okay. But you do recall taking those -- that drink and the medication up there.

A Very much.

Q About how long did it take you to get down to the spot on St. Clair?

A Three minutes maybe. Three minutes.

Q Okay. If Mr. Swenson's written statement says that at 2:55 he got a phone call from your family about the concern which prompted him to go over to see you, does that sound about right for timing?

A Yeah.

Q And you would agree that you're probably down at the lake maybe somewhere around 3:15 or longer?

A Even -- maybe even before that.

Q Okay. Any substantial time before that?

A I don't know. Maybe 3:10, 3:05.

Q Okay. Right around there.

A Yeah.

Q Okay. Did you have any ice in your glass?

A No.

Q You take alprazolam and what was the other name of **[268]** the medication?

A Amitriptyline.

Q And do either of those affect your judgment?

A Yes.

Q Okay.

A They're a psychoactive drug from what my doctor told me.

Q That's what they're supposed to do.

A Obviously not doing the job they're supposed to.

Q Okay. During that day you said you had taken those medications, right?

A Yes.

Q And you still were feeling depressed, so they weren't working.

A Yes.

Q Do you recall how many specific pills you put in your pocket?

A No.

Q Can you give an estimate?

A Of the both different pills, 30 to 40.

Q Okay. Would that have been all of your pills, or would that have been some of the pills?

A It wasn't all of them.

Q Okay. You don't recall a specific -- you don't recall walking back to the area of Eighth and **[269]** St. Clair, correct?

A Correct. That medication that I took works fairly quickly. One of the medications does, the alprazolam.

Q You had been taking that though prior to the actual moment of truth as you said.

A Not in an overdose.

Q But were taking them --

A Yeah, for years. Twenty years.

Q Okay. Do you recall telling the officer that you had been drinking at your residence before driving?

A No.

Q Do you recall telling the officer that you were too drunk to drive?

A I don't remember that.

Q Okay.

A 'Cuz I was on my way back, and I don't remember any of it.

Q Do you recall being placed in handcuffs?

A No.

Q Do you recall any particular officer being there? Let me ask this way. Do you recall this officer being there?

ATTORNEY WINGROVE: I'm going to object. Asked and answered. He's already testified he didn't **[270]** remember anything that happened at that point.

THE WITNESS: Yeah, I don't remember.

THE COURT: He answered the question.

BY ATTORNEY HABERMAN:

Q Do you recall Officer Jaeger asking you to submit to field sobriety tests?

A No. I did see the video though.

Q Okay. So do you recall the response that you gave when he asked you?

A Not in my brain. Not in my memory. I remember seeing the video.

Q Okay.

A And I just refused.

Q Is it accurate to say that you said you have skinny ankles and that's why you couldn't do the test?

A Yes.

Q And that's what you saw in the video?

A Yes.

Q Isn't it true that you told him that on more than one occasion that's why you couldn't do the test?

A It's on the video. I don't recall that.

Q Okay. Do you recall watching it on the video on more than one occasion you said you have skinny ankles and you can't do the test?

A Yeah. I just deferred and said just give me the [271] breath test. That's the same thing. From what I remember of the video.

Q You've been around people that have been drunk before, haven't you?

A Yes.

Q Would you agree that you -- when you watch the video, when you heard the way you talked, that was consistent with someone who had been highly intoxicated?

A I was really intoxicated.

Q So you would agree that that's consistent with one who's really intoxicated.

A Oh yeah.

Q And you would agree that on the video you can see a little bit, not much, but a little bit of your inability to balance and stand straight.

A Little bit, yeah.

Q Okay. You would agree that you eventually went maybe -- I don't know the best way to use here -- maybe unconscious or not responsive in the back of

the squad car. You would agree you could see that on the video at some point.

ATTORNEY WINGROVE: I'm going to object. Best evidence rule. If he wants to question Mr. Mitchell about what's on the video, he can just show the video.

[272] THE COURT: Well, I'm not sure it's a very important point. So Mr. Haberman, why don't you just move on.

ATTORNEY HABERMAN: I will, Judge.

BY ATTORNEY HABERMAN:

Q Mr. Mitchell, how much do you weigh today?

A Today?

Q Yeah.

A A hundred 60.

Q What did you weigh back in May?

A Hundred 45.

Q Okay. And you recall how much you had to eat that day?

A No.

Q You recall having any sort of meal that day?

A No. I was just pretty depressed. I don't remember if I ate or not.

Q Okay.

A Probably not if I was depressed. Like I said, my memory had been affected by that amount of medication that I took.

Q What did you do with your cup?

A I believe I may have thrown it down by the beach.

Q Do you recall that or not?

A Yeah. Actually I do. I'm a litterbug.

[273] Q Did you strike anything with your vehicle on the way down to St. Clair?

ATTORNEY WINGROVE: Objection. Relevancy.

THE COURT: Sustained.

ATTORNEY HABERMAN: Judge, it would go to --

ATTORNEY WINGROVE: If we want to have a sidebar, I would be happy to approach.

THE COURT: I've already ruled.

ATTORNEY HABERMAN: Nothing further, Judge

THE COURT: Redirect?

ATTORNEY WINGROVE: Very brief.

REDIRECT EXAMINATION

BY ATTORNEY WINGROVE:

Q Where do you buy your vodka? Do you remember where you bought it?

A No.

Q Typically where would you buy vodka?

A Maybe Piggly Wiggly.

Q Okay. You go to Piggly Wiggly, and typically there's three sizes of bottles on the shelf, correct? There's a big --

A Yeah.

Q Do you know what the big one's called?

A No, but it's got to be close to, like, a half gallon.

[274] Q Okay. Then there's another one. Usually it's about half the size of that. Do you know what that one's called?

A That's a fifth.

Q Okay. And then there's one just a little bit smaller than that. Do you know what that one's called?

A Yeah. That's, like, a hundred 75 --

Q No, I'm talking about on the shelf. 'Cuz don't they usually put the small bottles in back so people won't steal them?

A Well, there's an intermediate that might be found on the floor that -- you're thinking of a pint. I can pretty much tell that. But there's also a quantity that's real close to a liter.

Q Sure. And that was the size of the bottle?

A No. It was a fifth.

Q Okay. So you understand the difference between a fifth and liter.

A Sure.

Q And how much of that fifth did you pour into that cup, half the bottle, more or less?

A It was a little less than half.

Q Okay. A lot more than half or just a little less than half? Or you don't remember?

[275] A Well, I don't know what a lot and a little less than a half is.

Q Okay. When you saw the video of the interview by Jaeger, you concede you're intoxicated, correct?

A Yes.

Q What were you intoxicated by?

A The medication I had taken at the lake and the drink that I had taken that with.

Q And then you spent a period of time at the hospital?

A Yeah. I was in a coma for a day-and-a-half.

Q And then at Behavioral Health?

ATTORNEY HABERMAN: Judge, I'm going to object. Relevance now.

THE COURT: I think we're getting beyond the scope of cross-exam.

ATTORNEY WINGROVE: I'm done.

* * *

No. 18-6210

IN THE

Supreme Court of the United States

GERALD P. MITCHELL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

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QUESTION PRESENTED

Whether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement.

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OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin (J.A. 8–60) is reported at 914 N.W.2d 151. The certification of the case to that court by the state court of appeals (J.A. 61–76) is unreported. The opinion of the circuit court (J.A. 97–140) is unreported.

STATEMENT OF JURISDICTION

The Supreme Court of Wisconsin issued its decision on July 3, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Wisconsin Stat. § 343.305(2) provides: "(2) **Implied consent.** Any person who is on duty time with respect to a commercial motor vehicle or drives or operates a motor vehicle upon the public highways of this state, or in those areas enumerated in § 346.61, is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances, controlled substance analogs or other drugs, or any combination of alcohol,

controlled substances, controlled substance analogs and other drugs, when requested to do so by a law enforcement officer under sub. (3)(a) or (am) or when required to do so under sub. (3)(ar) or (b). Any such tests shall be administered upon the request of a law enforcement officer. The law enforcement agency by which the officer is employed shall be prepared to administer, either at its agency or any other agency or facility, 2 of the 3 tests under sub. (3)(a), (am), or (ar), and may designate which of the tests shall be administered first."

Wisconsin Stat. § 343.305(3)(b) provides: "A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection, and if a law enforcement officer has probable cause to believe that the person has violated § 346.63 (1), (2m) or (5) or a local ordinance in conformity therewith, or § 346.63 (2) or (6) or 940.25, or § 940.09 where the offense involved the use of a vehicle, or detects any presence of alcohol, controlled substance, controlled substance analog or other drug, or a combination thereof, on a person driving or operating or on duty time with respect to a commercial motor vehicle or has reason to believe the person has violated § 346.63 (7), one or more samples specified in par. (a) or (am) may be administered to the person."

STATEMENT OF THE CASE

Without seeking a warrant, police caused petitioner Gerald Mitchell's blood to be drawn while he was unconscious following his arrest on suspicion of drunk driving. The State conceded that no exigent circumstances prevented it from obtaining a warrant. Rather, it maintained that no warrant was required

pursuant to Wisconsin's implied-consent law, Wis. Stat. § 343.305, which authorizes the police to draw blood from an unconscious person if they have probable cause to suspect drunk driving. That provision, it contended, establishes that any person who chooses to drive on Wisconsin's roads consents to submit to a blood draw while unconscious.

In recent years, this Court has twice rejected efforts to create new, categorical exceptions to the warrant requirement in the context of drunk-driving arrests. In *Missouri* v. *McNeely*, 569 U.S. 141 (2013), the Court held that the natural dissipation of alcohol from the blood stream does not constitute per se exigent circumstances that justify the warrantless drawing of blood from an individual suspected of drunk driving. *Id.* at 156. And in *Birchfield* v. *North Dakota*, 136 S. Ct. 2160 (2016), the Court held that a blood draw is not a reasonable search incident to arrest. *Id.* at 2184. The State now seeks yet again to create a categorical exception to the warrant requirement, this time for blood draws from unconscious drunk-driving suspects. And it seeks to do so in an unprecedented manner — by writing consent into law where no actual consent exists in fact. The Fourth Amendment does not permit this end run around the warrant requirement.

A. Factual Background

In May of 2013 in Sheboygan, Wisconsin, petitioner Gerald Mitchell's neighbor called the police and reported that petitioner's sister had called him and said that petitioner was planning to take his own life. The neighbor found petitioner in the stairwell of his apartment building. He seemed intoxicated and agitated, and the neighbor watched him get into a van

and drive off. J.A. 146–156. At his trial, petitioner would testify that, on that day, he was depressed and had decided to kill himself. To that end, he had mixed a half-liter of vodka with Mountain Dew, and brought that and about 40 pills to the shore of Lake Michigan. There, he took the pills and drank. J.A. 263–267.

Police quickly located petitioner walking near the lake; his van was found parked nearby. He was belligerent and was having trouble staying upright. J.A. 104–105. The officers gave him a roadside breath test (using a device of limited accuracy whose results are inadmissible by state statute), which showed a blood-alcohol concentration ("BAC") of .24. J.A. 107–109. Then they loaded him into a squad car and took him to the police department. There, he was placed in a holding cell, where at some point he "began to close his eyes and sort of fall asleep or perhaps pass out," though he "would wake up with stimulation." Because petitioner was "so intoxicated * * * or having some type of a medical concern" and police "didn't feel that a breath test would be appropriate," they decided to take him to the hospital for a blood draw. J.A. 110. By the time they arrived at the hospital, approximately an hour after his arrest, he was unresponsive and could not be roused. J.A. 110–113.

An officer read Wisconsin's statutorily mandated "Informing the Accused" form aloud in petitioner's presence, though petitioner remained unconscious. J.A. 111. The officer then directed hospital personnel to take petitioner's blood for testing. J.A. 115–117. The blood was drawn about an hour and a half after petitioner's arrest. J.A. 118–119, 125. Testing showed a BAC of .222. J.A. 220.

B. Procedural Background

Petitioner was charged with operating while intoxicated and with a prohibited blood alcohol concentration. J.A. 11. He moved to suppress the blood test results on the ground that his blood was taken without a warrant or exigent circumstances. J.A. 12. The State agreed there was no exigency, but argued that, under Wisconsin's implied-consent statute, petitioner had consented to the test simply by driving on state roads, and had not withdrawn his consent. J.A. 133–134. The trial court upheld the search, relying on the implied-consent statute. J.A. 137–140. The State introduced the test results at petitioner's jury trial, and he was convicted of both counts. J.A. 12.

Petitioner appealed the suppression decision, and the court of appeals certified the case to the Supreme Court of Wisconsin on a single issue: "whether the warrantless blood draw of an unconscious motorist pursuant to Wisconsin's implied consent law, where no exigent circumstances exist or have been argued, violates the Fourth Amendment." J.A. 61. The court of appeals explained that while this Court has "referred approvingly of the general concept of implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply, * * * it has yet to decide whether the 'implied consent' that flows from a statutory scheme constitutes actual Fourth Amendment consent." J.A. 67. It observed that some state courts have "concluded that statutory implied consent satisfies the Fourth Amendment" while others "have reasoned that such implied consent is a legal fiction that does not take into account the totality of the circumstances as required

by" this Court, and so cannot sustain a warrantless search. J.A. 67 (citation omitted).

The Supreme Court of Wisconsin accepted certification. The court ultimately upheld the search by a 5-2 vote, but there was no majority for any rationale. A three-justice plurality concluded that the search was constitutional on the basis of the implied-consent statute. First, the plurality invoked Wis. Stat. §§ 343.305(2) & (3)(a), which provide that anyone who drives on the public highways is "deemed to have given consent" to a blood test upon arrest on suspicion of, among other things, drunk driving. It posited that, "in the context of significant, well-publicized laws designed to curb drunken driving," a driver's consent to Wisconsin's warrantless blood draw regime is "complete at the moment the driver begins to operate a vehicle upon Wisconsin roadways." J.A. 19–20.

Second, because petitioner was unconscious at the time of the blood draw, the plurality relied on Wis. Stat. § 343.305(3)(b), which provides that "[a] person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent" to a warrantless blood draw. Although the plurality recognized that, "[o]f course, consent voluntarily-given before a blood draw may be withdrawn," J.A. 25, it concluded that, by drinking sufficient alcohol to render himself unconscious, petitioner "forfeited all opportunity to withdraw the consent to search that he had given." J.A. 32.

Two justices, in a concurring opinion, also concluded that the search was constitutional, but not on the basis of consent. The concurring justices found that "legislative consent cannot satisfy the mandates of our State

and Federal Constitutions." J.A. 38. Nonetheless, they voted to uphold the constitutionality of the blood draw as a reasonable search incident to arrest — a rationale not advanced in the State's brief. They reasoned that, unlike *Birchfield*, where the arrestees were conscious and could have submitted to a breath test, no less-intrusive option was available to the officers who arrested petitioner, and the warrantless search was therefore reasonable. J.A. 43–45.

Two justices dissented. Noting that a blood draw is a "particularly intrusive search" that "invades the interior of the human body and implicates interests in human dignity and privacy," the dissenting justices found that "[c]onsent provided solely by way of an implied consent statute is constitutionally untenable." J.A. 50–51.

This Court granted petitioner's petition for certiorari on January 11, 2019.

SUMMARY OF THE ARGUMENT

A blood draw is a "compelled physical intrusion" that "implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *Missouri* v. *McNeely*, 569 U.S. 141, 148 (2013) (citation omitted). This Court's precedents firmly establish that the State must obtain a warrant before it may undertake this physical intrusion, unless a recognized exception to the warrant requirement applies. The State here sought to rely on the voluntary-consent exception. But rather than relying on actual consent in fact, which, under this Court's precedents, must be inferred from the "totality of all the surrounding circumstances," *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226 (1973),

it relied on consent "deemed" by law. The State, and a plurality of the Wisconsin Supreme Court, asserted that pursuant to Wisconsin's implied-consent statute, petitioner's decision to drive on state roads constituted consent to a blood test while unconscious.

This legislatively deemed consent is irreconcilable with the requirements of the Fourth Amendment. The necessary implication of the Wisconsin Supreme Court's decision is that a State could simply provide by law that commonplace conduct that millions of people engage in every day — walking down public streets at certain times of day, for instance, or using a cell phone — constitutes consent to a search or seizure. This Court should not countenance that end run around the Fourth Amendment's bedrock warrant requirement. Nor can the blood draw that occurred here be justified as a condition on receipt of a government benefit or, as two justices of the Wisconsin Supreme Court held, as a search incident to arrest.

I. This Court's precedents establish that consent to a search under the Fourth Amendment must be "freely and voluntarily given." *Bumper* v. *North Carolina*, 391 U.S. 543, 548–550 (1968). Whether an individual gave valid consent is "to be determined from the totality of all the circumstances," and the State bears the "burden of proving that the consent was, in fact, freely and voluntarily given." *Schneckloth*, 412 U.S. at 222, 227 (internal quotation marks and citation omitted). Moreover, an essential feature of voluntary consent is that it may be limited or withdrawn at will. See *Florida* v. *Jimeno*, 500 U.S. 248, 252 (1991).

All 50 states maintain what are known as "implied-consent" laws. Those laws generally provide that a

driver consents to BAC testing if arrested for drunk driving, and they impose administrative or evidentiary penalties for refusal to consent to testing at the scene. In that way, these statutes regulate the incentives operating on a driver who is stopped on suspicion of drunk driving and asked to consent to BAC testing. In *Birchfield* v. *North Dakota*, 136 S. Ct. 2160 (2016), this Court held that an implied-consent statute that imposed criminal penalties on the refusal to consent at the scene (rather than merely civil consequences) was unduly severe — in other words, coercive — and therefore unreasonable under the Fourth Amendment. Thus, a driver's consent to a blood test upon his arrest must be voluntary under the totality of the circumstances. This conclusion is consistent with that of the majority of states to consider the matter; they have overwhelmingly held that implied-consent statutes cannot themselves supply constitutionally sufficient consent, but instead simply incentivize cooperation with law enforcement and thus provide encouragement to consent at the scene.

Here, though, the State argued that Wisconsin's implied-consent statute relieves it of the burden to demonstrate, by the totality of the circumstances, that petitioner gave actual, voluntary consent to the blood draw. A plurality of the Wisconsin Supreme Court agreed, holding that the implied-consent statute "deem[s]" every motorist on Wisconsin's highways to have consented to a blood draw upon arrest on suspicion of drunk driving. Because petitioner was unconscious, the State further relied on the provision of the implied-consent statute that provides that unconscious individuals are "presumed" not to have withdrawn their consent to warrantless blood testing. The plurality accepted the State's theory, holding that,

simply by his act of driving, petitioner could be deemed to have consented to have his blood drawn while he was unconscious.

This contention cannot be squared with this Court's approach to voluntariness in the Fourth Amendment context. The Court has repeatedly held that the existence of voluntary consent is a question of fact that the State bears the burden to prove in light of "all the surrounding circumstances." *Schneckloth*, 412 U.S. at 226; *Florida* v. *Bostick*, 501 U.S. 429, 438 (1991). The State made no effort to meet this burden, and it would have been unable to do so. By definition, petitioner was unable to give voluntary consent because he was unconscious and unable to exercise volition. But that incontrovertible fact was rendered irrelevant by the State's implied-consent statutes — as were various other circumstances that would have been relevant to the consent inquiry. The State thus purported to relieve itself of the burden of making the showing required by this Court's precedents regarding voluntary consent to search. This Court should not permit the State to bypass the Fourth Amendment's warrant requirement by legislatively deeming consent to be present in every case.

II. Nor may the State impose warrantless blood draws while unconscious as a condition of the privilege of driving. Such a condition would be unreasonable in light of the balance of interests involved. A blood test is a significant bodily intrusion that "infringes an expectation of privacy that society is prepared to recognize as reasonable." *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989). The severity of this intrusion is not diminished, and may even be exacerbated, when performed on an unconscious person.

On the other side of the ledger, requiring a warrant to draw blood from unconscious drivers poses little risk of impeding the State's ability to obtain BAC evidence. Advances in warrant procedures and technologies have significantly reduced the time and burden of securing a warrant. At the same time, obtaining a blood sample necessarily entails some delay, as the suspect usually must be transported to an appropriate facility. Thus, the State will often be able to secure a warrant within the time it takes to initiate the blood draw. And, if the circumstances are such that obtaining a warrant is not feasible, the State will be able to invoke the exigent circumstances exception. Thus, the balance of interests tilts strongly in favor of the individual's privacy interest in being free from warrantless blood draws.

III. Finally, the State argued for the first time in its opposition to certiorari that the blood draw could be justified as a reasonable search incident to arrest, for which no warrant was required. This Court rejected that argument in *Birchfield*. It recognized that a blood test may be called for where the suspect is unconscious and therefore unable to submit to a breath test, but it concluded that there was "no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be." 136 S. Ct. at 2184–2185. In any event, the same balancing test that demonstrates that warrantless blood draws while unconscious are an unreasonable condition of the privilege of driving also demonstrates that they are not a reasonable search incident to arrest.

ARGUMENT

I. The Fourth Amendment does not permit the State to deem a motorist to have consented to an unconscious blood draw simply by virtue of his decision to drive.

In recent years, this Court has made clear that the bedrock Fourth Amendment principles governing searches and seizures apply with full force to investigations of individuals suspected of drunk driving — in particular, to physical intrusions into their bodies. The Court has thus twice declined to adopt a categorical rule placing blood draws from suspected drunk drivers outside the warrant requirement — first in the form of a per se rule that suspicion of drunk driving creates exigent circumstances justifying a warrantless blood draw, and then in the form of a per se rule that blood tests may be performed as searches incident to arrest. See *Missouri* v. *McNeely*, 569 U.S. 141 (2013); *Birchfield* v. *North Dakota*, 136 S. Ct. 2160 (2016). This case concerns yet another proposed per se exception to the warrant requirement: the asserted consent of unconscious drivers to a blood draw, imputed by virtue of state law rather than — as this Court's voluntariness precedents clearly require — inferred from the totality of the circumstances. The Court should reject that bespoke categorical exception to the warrant requirement, just as it rejected the per se exceptions at issue in *McNeely* and *Birchfield*.

A. Fourth Amendment principles apply with full force to blood draws from drunk-driving suspects.

Taken together, *McNeely* and *Birchfield* establish that a warrant is generally required before law enforcement may draw the blood of an individual suspected of drunk driving. In both cases, the Court employed general Fourth Amendment principles, expressly rejecting arguments that the drunk-driving context merited unique, categorical rules.

1. In *McNeely*, the Court held that the natural dissipation of BAC evidence in the blood does not create a per se exigency that categorically justifies drawing blood without first seeking a warrant. The Court emphasized that under ordinary Fourth Amendment principles, a warrant is required before law enforcement officers may conduct a search of an individual's body: "[o]ur cases have held that a warrantless search of the person is reasonable only if it falls within a recognized exception" to the warrant requirement. 569 U.S. at 148. "That principle," the Court explained, "applies to the type of search at issue in this case, which involved a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *Ibid.* (citation omitted).

Seven Members of the Court concluded that a blood draw is a "significant bodily intrusion" that implicates substantial "constitutionally protected privacy interests." *McNeely*, 569 U.S. at 159 (plurality op.); *id.* at

174 (Roberts, C.J., joined by Alito and Breyer, JJ., concurring). As the plurality explained, while driving on a public highway is a state-granted "privilege" subject to considerable regulation, that fact "does not diminish a motorist's privacy interest in preventing an agent of the government from piercing his skin." *Id.* at 159 (plurality op.); accord *id.* at 174.

The Court accordingly declined to create a categorical exigent-circumstances exception to the warrant requirement for blood tests of suspected drunk drivers. The Court explained that under its Fourth Amendment precedents, whether exigent circumstances are present ordinarily depends on the "totality of the circumstances." 569 U.S. at 150. The Court saw no reason that those principles should not apply in the drunk-driving context. *Id.* at 156; accord *id.* at 166–167 (Roberts, C.J., concurring) (agreeing that ordinary exigent-circumstances principles should apply, but extrapolating a general rule from those principles).

2. In *Birchfield*, the Court considered the exception to the warrant requirement for searches incident to arrest, once again applying ordinary Fourth Amendment principles. 136 S. Ct. at 2174. The State contended that both breath and blood tests of drivers arrested for drunk driving should be considered searches incident to arrest. Applying the general balancing test applicable to such searches, the Court held warrantless breath tests reasonable because the intrusion of a breath test was minimal and outweighed by the law enforcement interests at stake. *Id.* at 2176, 2184. It reached the opposite conclusion with respect to blood tests. The Court reaffirmed its statement in *McNeely* that blood tests are a "significant" intrusion that "extract a part of the subject's body," and "place[] in the

hands of law enforcement authorities a sample that can be preserved" and used to glean additional information. *Id.* at 2178. In light of the severity of the intrusion and the usual availability of breath tests, the Court held that officers may not perform warrantless blood tests as searches incident to arrest. *Id.* at 2185.

In sum, the Court has now twice reached the same conclusion — that if police "can reasonably obtain a warrant" for a blood draw "without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *McNeely*, 569 U.S. at 152.

B. When law enforcement relies on consent to justify a blood test of a suspected drunk driver, ordinary Fourth Amendment consent principles apply.

As with searches in other contexts, many (if not most) drunk-driving blood draws are achieved not through the compulsion of a warrant, but by the consent of the motorist. But here, too, the Court applies the usual rules. This is plain from *Birchfield*, which, though it primarily addressed the "search incident to arrest" rationale, also addressed claims that blood tests "are justified based on the driver's legally implied consent to submit to them." 136 S. Ct. at 2185.

1. Consent to search is a well-established exception to the warrant requirement. See *Katz* v. *United States*, 389 U.S. 347, 358 n.22 (1967); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 219 (1973); 2 Wayne R. LaFave, et al., *Criminal Procedure* § 3.10(a) (4th ed. 2004) ("Consent searches are frequently relied upon by police as a means of investigating suspected criminal

conduct."). Equally well established is that, to be valid for Fourth Amendment purposes, consent must be "freely and voluntarily given." *Bumper* v. *North Carolina*, 391 U.S. 543, 548–550 (1968); *Florida* v. *Bostick*, 501 U.S. 429, 438 (1991) (consent to search is valid "only if the cooperation is voluntary," and the court must determine whether defendant "chose to permit the search"). Consent that is the "product of duress or coercion," *Schneckloth*, 412 U.S. at 227, or that results from mere "acquiescence to a claim of lawful authority," *Bumper*, 391 U.S. at 549, is invalid and the ensuing search unreasonable. Whether the individual in fact gave valid consent to a search is "to be determined from the totality of all the circumstances," and the State bears the "burden of proving that the consent was, in fact, freely and voluntarily given." *Schneckloth*, 412 U.S. at 222, 227 (internal quotation marks and citation omitted).

Critically, an individual's consent must persist, and remain voluntary, throughout the course of the search. "A suspect may of course delimit as he chooses the scope of the search to which he consents." *Florida* v. *Jimeno*, 500 U.S. 248, 252 (1991); *Florida* v. *Jardines*, 569 U.S. 1, 9 (2013) ("[T]he scope of a license — express or implied — is limited not only to a particular area but also to a specific purpose"). A suspect therefore may withdraw previously given consent before or during a search, and the officers must respect that withdrawal. See, *e.g.*, *United States* v. *Williams*, 898 F.3d 323, 330 (3d Cir. 2018), *cert. filed*, No. 18-7726 (Feb. 1, 2019); *United States* v. *$304,980.00 in U.S. Currency*, 732 F.3d 812, 819 (7th Cir. 2013) ("Clearly a person may limit or withdraw his consent to a search, and the police must honor such limitations.") (citation omitted); 4 Wayne R. LaFave, 4 *Search & Seizure* § 8.2(f)

(5th ed. 2012) ("A consent to search is not irrevocable and thus if a person effectively revokes his prior consent prior to the time the search is completed, then the police may not thereafter search in reliance upon the earlier consent."). Whether an individual has withdrawn consent turns on whether a reasonable officer would understand him to have done so. *Jimeno*, 500 U.S. at 252. In all events, the State bears the burden of demonstrating that the search and its scope are supported by actual, voluntary consent. See *Schneckloth*, 412 U.S. at 227.

2. In *Birchfield*, the Court considered the constitutionality of an "implied consent" statute that imposed criminal penalties on the refusal to submit to a blood test when arrested on drunk driving charges. 136 S. Ct. at 2184–2185. As the Court observed, all 50 States have implied-consent statutes that provide that "cooperation with BAC testing [is] a condition of the privilege of driving on state roads and that the privilege [will] be rescinded if a suspected drunk driver refuse[s] to honor that condition." *Id.* at 2169. Although these statutes are generally known as "implied-consent" statutes because they state that consent to BAC testing is a condition of driving, they contemplate that a suspected drunk driver will have the opportunity, upon his arrest, to either acquiesce to a blood test, or else refuse and face the consequences. *Ibid.* The statutes seek to discourage refusal (especially physical resistance) by imposing these consequences, thus altering the incentives at the scene of a drunk-driving arrest by making the driver think twice about refusing the test. That is, they seek to create conditions that encourage consent, while allowing enough leeway for refusal to ensure that consent, if given, will ordinarily be voluntary within

the meaning of *Schneckloth* and this Court's other precedents. See, *e.g.*, *Commonwealth* v. *Myers*, 164 A.3d 1162, 1170–1171, 1176 (Pa. 2017) ("Our implied consent statute is not an ipso facto authorization to conduct a chemical test. Rather, it is the statutory mechanism by which a police officer may seek to obtain voluntary consent.").

The *Birchfield* Court struck down North Dakota's implied-consent statute on the ground that imposing criminal consequences for refusing to submit to a blood test is unreasonable under the Fourth Amendment. The Court emphasized that it was not casting doubt on traditional implied-consent statutes that impose civil penalties and evidentiary consequences on the refusal to submit to testing. *Birchfield*, 136 S. Ct. at 2185. But the Court concluded that it "is another matter * * * for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test." *Ibid.*

The only distinction between traditional implied-consent laws — of which the Court spoke "approvingly" — and the North Dakota statute was the severity of the consequences that the North Dakota statute imposed for refusing a blood test. *Id.* at 2185–2186. In holding that the severity of the consequences rendered the North Dakota statute unreasonable under the Fourth Amendment, the Court established that a driver must have a meaningful, uncoerced opportunity to refuse a blood test. In other words, because the role of the implied-consent statute is to encourage the driver at the scene to consent to the blood test, the consequences of refusing must not be so severe that they would risk coercing the driver to submit to the test. Indeed, the Court cited *Schneckloth* in discussing the

type of consent that may render a blood test reasonable. *Birchfield*'s treatment of criminal consequences thus affirms that a driver's consent to blood testing at the scene pursuant to an implied-consent regime must be voluntary for the search to be valid on a consent theory.

The Court followed that principle in applying its ruling to the petitioners in the case. One petitioner, Beylund, had submitted to a blood test after he was told that the North Dakota statute "required his submission" and would impose criminal consequences for refusal. *Birchfield*, 136 U.S. at 2186. The North Dakota Supreme Court had held that Beylund had voluntarily consented to the blood test, and that the criminal penalties for refusal were not unduly coercive. *Beylund* v. *Levi*, 859 N.W.2d 403, 409 (N.D. 2015); *Birchfield*, 136 S. Ct. at 2172. Beylund contended before this Court, however, that his consent could not be considered voluntary because of the coercive nature of the criminal penalties with which he was threatened. Beylund Br. 9–13, *Birchfield, supra* (No. 14-1507). This Court agreed, holding that "[b]ecause voluntariness of consent to a search must be 'determined from the totality of all the circumstances,'" the lower courts would have to reevaluate the voluntariness of Beylund's consent in light of the fact that he was erroneously told that the state could impose criminal penalties if he refused consent. *Birchfield*, 136 S. Ct. at 2186 (citing *Schneckloth*, 412 U.S. at 227).

In sum, *Birchfield* establishes that, to be justified on the basis of consent, a blood test must be the product of actual, *voluntary* consent. While a driver's decision to drive in a state against the backdrop of an implied-consent law may be part of the facts relevant to

consent, the driver's consent at the scene must be voluntary in light of the incentives informing that choice and the totality of the circumstances. That conclusion is consistent with the well-established rule that consent must be voluntary under the totality of the circumstances, *Schneckloth*, 412 U.S. at 227, as well as the related principle that an individual's withdrawal of any previously given consent must be respected, *Jimeno*, 500 U.S. at 252.

The vast majority of state appellate courts to consider the interaction of an implied-consent statute with this Court's voluntariness precedents have reached the same conclusion. *Williams* v. *State*, 771 S.E.2d 373, 377 (Ga. 2015) (collecting cases). They have held that implied-consent statutes do not obviate the need to examine whether a driver's consent to BAC testing at the scene was voluntary under *Schneckloth*. See, *e.g.*, *Myers*, 164 A.3d at 1178 (analyzing *Birchfield* and concluding "that the requirement of voluntariness remains in full force despite the existence of a statutory implied consent provision").[1] Put another

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[1] See also, *e.g.*, *State* v. *Banks*, --- P.3d ---, 2019 WL 474794, at *3–4 (Or. 2019) (relying on Oregon constitution, which, like the Fourth Amendment, has a consent exception to the warrant requirement); *State* v. *Pettijohn*, 899 N.W.2d 1, 28 (Iowa 2017) ("From these general observations about the nature of effective consent sufficient to justify a warrantless search, it follows that statutorily implied consent cannot function as an automatic exception to the warrant requirement."); *State* v. *Ryce*, 368 P.3d 342, 363–369 (Kan. 2016), *adhered to on reh'g*, 396 P.3d 711 (2017); *People* v. *Arredondo*, 199 Cal. Rptr. 3d 563, 573 (2016), *review granted*, 371 P.3d 240 (Cal. 2016); *Flonnory* v. *State*, 109 A.3d 1060, 1065 (Del. 2015); *State* v. *Modlin*, 867 N.W.2d 609, 619 (Neb. 2015) (distinguishing between "implied" and voluntary consent, but finding the implied-consent statute relevant to the totality-of-the-circumstances inquiry); *State* v. *Yong Shik Won*, 372

way, the Fourth Amendment does not permit an implied-consent statute to supply, as a matter of law, constitutionally sufficient consent to BAC testing. See *State* v. *Fierro*, 853 N.W.2d 235, 243 (S.D. 2014) ("[T]he Legislature cannot enact a statute that would preempt a citizen's constitutional right, such as a citizen's Fourth Amendment right.").

C. The blood test performed on petitioner while he was unconscious cannot be justified on the basis of implied consent.

In this case, the State invoked Wisconsin's implied-consent statute to supply petitioner's consent *as a matter of law* to a blood test performed when he was unconscious. That use of the implied-consent statute is fundamentally inconsistent with the voluntary-consent analysis required by the Fourth Amendment.

Petitioner had no opportunity to consent or refuse the blood test that the officer sought following his arrest, because he was unconscious at the time. Unable to establish that petitioner voluntarily consented, the State defended the warrantless blood test on the sole ground that petitioner's consent could be imputed based on Wisconsin's implied-consent framework. A three-justice plurality of the Wisconsin Supreme Court accepted that rationale. Specifically, the plurality first asserted that under subsection 343.305(2), a motorist on a public highway "is deemed to have given consent

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P.3d 1065, 1089–1090 (Haw. 2015), as corrected (Dec. 9, 2015); *State* v. *Halseth*, 339 P.3d 368, 371 (Idaho 2014); *State* v. *Villarreal*, 475 S.W.3d 784, 800 (Tex. Crim. App. 2014); *Byars* v. *State*, 336 P.3d 939, 945 (Nev. 2014); *State* v. *Fierro*, 853 N.W.2d 235, 243 (S.D. 2014); *State* v. *Butler*, 302 P.3d 609, 613 (Ariz. 2013); *State* v. *Brooks*, 838 N.W.2d 563, 568–569 (Minn. 2013).

to" a blood test if, among other things, a law enforcement officer has probable cause to suspect drunk driving. J.A. 26. Because petitioner became unconscious after his arrest, the court then invoked subsection 343.305(3)(b), which provides that a "person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn" the consent implied through the act of driving. J.A. 32–33. These provisions, the plurality held, supply constitutionally sufficient consent, thereby categorically justifying warrantless blood tests in all cases in which a driver is unconscious, regardless of the actual circumstances present at the time. J.A. 37.

That rationale bears no resemblance to the limited use of the implied-consent statutory framework that the Court approved in *McNeely* and *Birchfield*. Rather than simply invoking the implied-consent framework to regulate the incentives around a motorist's decision to accept or decline an officer's request for a warrantless blood draw, the plurality instead relied on that framework to legislate consent into being by deeming an unconscious individual — who by definition cannot make any choice — to have provided constitutionally sufficient voluntary consent. If the North Dakota statute in *Birchfield* was invalid under the Fourth Amendment because it operated coercively on motorists deciding whether to consent to a blood test, there can be no question that Wisconsin's unconsciousness statute cannot render a blood test reasonable. The statute does not simply coerce consent; rather, it purports to make actual voluntary consent irrelevant by deeming it present in all cases.

1. Petitioner did not voluntarily consent to the blood test.

There can be no question that petitioner did not give his actual, voluntary consent to the blood draw taken at the direction of the police approximately an hour and a half after his arrest. Unlike the run-of-the-mill drunk-driving arrests considered in *Birchfield*, in which the individuals were conscious and therefore able to choose whether to submit to the blood draw, by the time of the request, petitioner had no ability to consent, voluntarily or otherwise. An unconscious individual "lacks capacity for conscious choice." *Schneckloth*, 412 U.S. at 224. This Court has described that condition as fundamentally incompatible with voluntary consent. *Ibid.* ("*Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice*, all incriminating statements — even those made under brutal treatment — are 'voluntary' in the sense of representing a choice of alternatives." (emphasis added) (citation omitted)). Indeed, this Court has long recognized in a variety of circumstances that someone who is unconscious "is not able to make an informed and voluntary choice to exercise * * * any * * * right." *Cruzan* v. *Director, Missouri Dep't of Health*, 497 U.S. 261, 280 (1990) (describing a person in a vegetative state).

The State therefore cannot satisfy its burden under *Birchfield* and *Schneckloth* of demonstrating that petitioner voluntarily consented to the blood draw. Indeed, the State rightly conceded below that it did not obtain petitioner's actual consent to the blood draw following his arrest. State Br. at 12 ("Officer Jaeger read the 'Informing the Accused form verbatim' to Mitchell,

but Mitchell was 'so incapacitated [that] he could not answer.'").

2. The Wisconsin Supreme Court improperly deemed petitioner to have consented by operation of the implied-consent statute.

Because the State cannot demonstrate that petitioner voluntarily consented to the blood draw, a plurality of the Wisconsin Supreme Court upheld the blood test on the sole ground that he may be *deemed* to have consented to a blood draw (including an unconscious blood draw) by virtue of his decision to drive in the state. Rather than treating voluntary consent as a question of fact on which the State bears the burden, *Schneckloth*, 412 U.S. at 222, the court simply deemed consent to be present by operation of law. But the State may not create a categorical exception to the warrant requirement by legislatively providing that consent is present in all cases, regardless of the actual facts.

(a) The State would be unable to demonstrate that drivers actually voluntarily consent to an unconscious blood draw.

As an initial matter, the legal presumptions on which the plurality of the Wisconsin Supreme Court relied — that an individual consents to a blood test by driving in the State, and then declines to withdraw that consent when unconscious — have no basis in fact. To the contrary, the State would be exceedingly unlikely to be able to shoulder its burden on either

question, absent the conclusive presumptions supplied by statute.

i. To demonstrate that individuals *actually* voluntarily consent to a blood draw by choosing to drive in the State, the State would have to demonstrate that "all the surrounding circumstances" justified that conclusion. *Schneckloth*, 412 U.S. at 226. While the existence of the implied-consent statute and the driver's decision to drive would be relevant to the analysis, the relevant circumstances would also include number of other factors: at a minimum, whether the driver had actual notice of the unconscious blood draw provision and whether, in light of his age, level of education, and intelligence, he understood its significance and, through his conduct, manifested actual consent.

In particular, consent extends only to those intrusions that a reasonable person in the situation would anticipate. *Jimeno*, 500 U.S. at 250–251. The State would therefore be hard-pressed to demonstrate consent unless it could show, at a minimum, that individuals know what they are purportedly consenting to when they drive in Wisconsin — in other words, that they are aware of the implied-consent statute and its unconscious blood-test provision, and that they understand that driving signifies consent. Although the plurality asserted, in conclusory fashion, that the state's laws concerning drunk driving are "well-publicized," J.A. 19, 28, the State did not make that argument in its brief, and the record is devoid of any such evidence. In fact, no mention of the unconscious blood-draw provision can be found in the Wisconsin Department of Motor Vehicles' "Motorist's Handbook," on its website's "frequently asked questions" page, or in its online driver's license

application.[2] It is highly unlikely, then, that the typical person would actually know about the statutes, much less expect that the mundane act of driving would authorize the State to draw her blood while unconscious.[3] This is particularly true given that a blood draw entails a significant intrusion on bodily integrity. See *McNeely*, 569 U.S. at 159 (noting drivers' "privacy interest in preventing an agent of the government from piercing [their] skin"). Moreover, for the overwhelming majority of drivers, any consent could not be considered truly voluntary, as driving is not an optional activity for large portions of the

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[2] The Wisconsin Department of Transportation's 88-page "Motorist's Handbook" contains a section entitled "Wisconsin's alcohol laws," but it does not mention Wisconsin's unconsciousness provision. Wisconsin Department of Transportation, *Motorist's Handbook*, https://wisconsindot.gov/Documents/dmv/shared/bds126-motorists-handbook.pdf. Instead, it reinforces the impression of traditional implied-consent laws: that drivers have an opportunity to refuse a chemical test but can lose their license or be arrested for that choice. *Id.* at 8, 74. Nor does Wisconsin's online driver's license application contain any mention of consent to blood testing, much less the unconsciousness provision at issue here. Wisconsin Department of Transportation, *Driver License Guide*, https://app.wi.gov/DLGuides/. And while the Department of Motor Vehicles' "frequently asked questions" page states that an individual's license will be revoked for one to three years if he "refuse[s]" an "[i]ntoxilyzer" test (i.e., a breath test), it contains no mention of consenting to such a test, much less consenting to a blood test, conscious or unconscious. Wisconsin Department of Transportation, *Enforcement – FAQs*, https://wisconsindot.gov/Pages/safety/enforcement/faqs/default.aspx.

[3] It is easy to think of categories of drivers who would be particularly unlikely to know what they are purportedly consenting to. Out-of-state drivers, drivers with limited English proficiency, and drivers with low levels of education, to name just a few, cannot be presumed to know the technicalities of Wisconsin law, let alone to understand their significance and make a free and voluntary decision to accept their consequences.

population — in particular, those who must drive to work, and those who live in rural areas.[4]

The plurality attempted to sidestep the State's inability to prove knowledge of the law by holding that "we presume that drivers know the laws applicable to the roadways on which they drive." J.A. 24. But this Court has squarely rejected the argument that the general public can be held to have consented to a search regime established by statute on the theory that people are presumed to know the law. In *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), the Court held that a warrantless search contemplated by the Occupational Safety and Health Act of 1970 could not be justified on the ground that the individual had consented to the search by operating a business in interstate commerce with presumed knowledge of the law. The Court explained that while certain narrowly defined industries have such a history of pervasive regulation that participants can be subject to warrantless searches, *see* pp. 34–35, *infra*, "[i]t is quite unconvincing to argue that [federal labor regulations] prepared the entirety of American interstate commerce for regulation of working conditions to the minutest detail." 436 U.S. at 314. It was therefore impossible to infer "any but the most fictional sense of voluntary consent to later searches [from] the single fact that one conducts a business affecting interstate commerce; under current practice and law, few businesses can be con-

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[4] See, *e.g.*, Bureau of Transportation Statistics, *Commuting to Work*, https://www.bts.gov/content/commuting-work (in 2013, 76.4% of American workers age 16 or older drove to work alone, and 9.4% carpooled; in Wisconsin, those figures were 80.5% and 8.2%, respectively).

ducted without having some effect on interstate commerce." *Ibid.* Thus, the Court declined to impute to anyone who conducts business in interstate commerce — i.e., any member of the public — knowledge of the law. And the Court further declined to presume that the commonplace act of engaging in a business in interstate commerce constituted voluntary consent to warrantless searches.[5]

It follows a fortiori from *Barlow's* that the State may not simply presume that the general public knows about the State's blood-draw statute. Only in "the most fictional sense" can citizens be said to know that state law authorizes law enforcement to draw their blood while they are unconscious if they are arrested for drunk driving. *Barlow's*, 436 U.S. at 314; see pp. 25–26 & note 2, *supra*. And driving is an even more commonplace, everyday activity than operating a business in interstate commerce — one that millions of people engage in every day.

ii. Subsection 343.305(3)(b) creates an equally counterfactual presumption that an unconscious person

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[5] By contrast, consent may be inferred from "the habits of the country," i.e., "background social norms" that everyone knows. *Florida* v. *Jardines*, 569 U.S. 1, 8 (2013). In *Jardines*, the Court observed that a homeowner with a knocker on his door implicitly grants a license to anyone to approach his home and knock. That inference arises because everyone knows that a door knocker is intended to be used by people who approach the house and wish to speak with its occupants. That is very different from presuming knowledge of a *statute* imposing warrantless searches and using that presumption as a basis for inferring consent to those very searches. As the Court emphasized in *Jardines*, it is possible to infer a license to approach a house precisely because that "customary invitation" "does not require fine-grained legal knowledge." 569 U.S. at 8.

has not withdrawn any previously given consent. Wisconsin's statutory scheme, like other implied-consent laws, contemplates that conscious individuals may refuse a blood test (subject to administrative consequences). Wis. Stat. § 343.305(9); *Birchfield*, 136 S. Ct. at 2185. But subsection 343.305(3)(b) provides that "[a] person who is unconscious *or otherwise not capable of withdrawing consent* is presumed not to have withdrawn consent under this subsection." (Emphasis added.) That presumption has no basis in reality: as the statutory text itself acknowledges, a person who is unconscious is *incapable* of withdrawing consent. The decision not to withdraw consent is just as much a volitional choice as the decision to consent in the first place. And given that a significant proportion of conscious drivers refuse to submit to blood testing, there is no basis on which to assume that an unconscious driver would not withdraw any consent previously given, if he could exercise volition. See NHTSA, Traffic Safety Facts Research Note, *Breath Test Refusal Rates in the United States – 2011 Update* 2 (Mar. 2014) (approximately one quarter of drunk-driving arrestees refuse a chemical test, with two states reporting over 70% refusal rates).

(b) The State may not dispense with the voluntary-consent analysis by deeming consent to be present.

As applied by the Wisconsin Supreme Court's plurality opinion, Wisconsin's statutory framework relieves the State of its burden of demonstrating voluntary consent to a blood draw by making a single fact — the defendant's decision to drive on Wisconsin roads —

dispositive of consent. That is fundamentally inconsistent with the voluntary-consent analysis required by the Fourth Amendment, in two respects.

First, the existence of voluntary consent is a question of fact that "necessitates a consideration of 'all the circumstances surrounding the encounter.'" *United States* v. *Drayton*, 536 U.S. 194, 201 (2002) (quoting *Florida* v. *Bostick*, 501 U.S. 429, 439 (1991)); see also *Richards* v. *Wisconsin*, 520 U.S. 385, 391–396 (1997). The State bears the burden of demonstrating that, in light of all the circumstances, the individual's consent has been "freely and voluntarily given."[6] *Schneckloth*, 412 U.S. at 222. The Wisconsin statutes short circuit that constitutionally mandated inquiry by declaring that the decision to drive is the only fact relevant to consent. In doing so, they render irrelevant all other circumstances, including the driver's actual knowledge of the statute, the circumstances surrounding her decision to drive, and most critically, her lack of opportunity to refuse the blood draw.

That is no different in substance from legislatively authorizing warrantless searches where the Fourth Amendment would forbid them. A statute that directly authorized warrantless blood tests in drunk-driving cases would unquestionably be invalid in light of *McNeely*'s instruction that the Fourth Amendment requires a warrant in the absence of exigent circumstances. See *McNeely*, 569 U.S. at 156; see also *City of Los Angeles* v. *Patel*, 135 S. Ct. 2443, 2452 (2015)

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[6] Indeed, because the existence of voluntary consent is a question of fact, appellate courts review for clear error. See, *e.g.*, *United States* v. *Siwek*, 453 F.3d 1079, 1083 (8th Cir. 2006).

(striking down statute that authorized warrantless inspections without providing the constitutionally mandated opportunity to object). Here, the State seeks to accomplish the exact same result by means of the consent exception to the warrant requirement. By providing that the mere act of driving constitutes consent to an unconscious blood draw, the State has deemed dispositive a fact that will necessarily be present in all cases. The statutes thus create a per se exception to the warrant requirement, and relieve the State of its burden to demonstrate consent in the particular case.

That per se rule is particularly troubling because it pertains to the "jealously and carefully drawn" consent exception to the warrant requirement. *Georgia* v. *Randolph*, 547 U.S. 103, 109 (2006) (citations omitted). The State's argument that it may legislate constitutionally sufficient consent in the driving context contains no evident limiting principle. If the State may simply provide that the act of driving constitutes consent to an unconscious blood draw, there is no apparent reason why it could not do the same in a wide range of other contexts.[7] As the LaFave treatise has explained, "[c]onsent in any meaningful sense cannot be said to exist merely because a person (a) knows that an official intrusion into his privacy is contemplated if he does a certain thing, and then (b) proceeds to do that thing," because otherwise, "the police could utilize the implied consent theory to subject everyone on the

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[7] Indeed, perhaps for this reason, this Court has repeatedly declined to establish categorical rules that individuals have consented in advance to a search condition — even when the search condition is expressly presented to them so that they are aware of it. See, *e.g.*, *Samson* v. *California*, 547 U.S. 843, 852 n.3 (2006); *United States* v. *Knights*, 534 U.S. 112, 118 (2001).

streets after 11 p.m. to a search merely by making public announcements in the press, radio and television that such searches would be undertaken." 4 *Search & Seizure* § 8.2(l) (internal quotation marks omitted); *People* v. *Arredondo*, 199 Cal. Rptr. 3d 563, 577–578 (2016), *review granted*, 371 P.3d 240 (Cal. 2016) ("It is far from implausible, for example, that a legislative body — state or federal — might decree, in the name of public safety or national security, that the use of the mails, or the phone lines, or the Internet — all of which rely to a greater or lesser extent on publicly owned property or facilities or publicly provided services — constitutes consent to search the contents of all communications thus conducted.").

Second, the Wisconsin Supreme Court plurality compounded its error by effectively treating the act of driving as supplying irrevocable consent to an unconscious blood draw. Perhaps recognizing that an unconscious person cannot consent to or refuse testing in any meaningful sense, the plurality asserted that once a driver initially consents under subsection 343.305(2) by driving, "the opportunity to refuse" the blood test on the scene "is not of constitutional significance."[8] J.A. 36. That is contrary to *Birchfield*, which proceeded on the premise that individuals arrested for drunk driving must voluntarily consent to a blood test at the scene, even when they have decided to drive

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[8] The plurality relied on *South Dakota* v. *Neville*, 459 U.S. 553 (1983), but that decision held only that the Fifth Amendment permits a State to use a driver's *refusal* to submit to BAC testing against him in a subsequent prosecution. *Neville* did not address the circumstances in which a driver may be viewed as *consenting* to BAC testing for purposes of the Fourth Amendment.

against the backdrop of implied-consent statutes. 136 S. Ct. at 2185–2186; see pp. 18–20, *supra*.

The error in the Wisconsin Supreme Court plurality's reasoning is particularly stark in the case of a conscious individual who *does* refuse the blood test. If an individual consents to a blood test by deciding to drive on state roads against the backdrop of subsection 343.305(2), such that provision of an "opportunity to refuse" the blood test on the scene "is not of constitutional significance," then the State may treat a motorist as consenting even if he vociferously refuses the blood test at the scene. That cannot be right: a suspect's revocation of previously given consent is a critical factor in evaluating whether the totality of the circumstances demonstrates that the consent was voluntary. See *Jimeno*, 500 U.S. at 252; *Jardines*, 569 U.S. at 9. Indeed, numerous state high courts have rejected the reasoning adopted by the plurality.[9] *E.g.*,

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[9] The Wisconsin Supreme Court plurality also suggested that by "[drinking] sufficient alcohol to render himself unconscious," petitioner "forfeited all opportunity to withdraw the consent to search that he had given." J.A. 32. But consent must always be "freely and voluntarily given." *Schneckloth*, 412 U.S. at 222. If an individual is unable to freely give consent, then he cannot consent to the search; it does not matter *why* he is unable to give consent. Thus, for instance, when an individual is intoxicated but still conscious, courts examine whether the individual was so intoxicated that he could not give voluntary consent. *United States* v. *Hardison*, 859 F.3d 585, 591 (8th Cir. 2017); *Hubbard* v. *Haley*, 317 F.3d 1245, 1253–1254 (11th Cir. 2003). They do not conclude that the individual forfeited his right to protest the search. And to the extent that the plurality believed that committing the criminal offense of driving while intoxicated could constitute an implicit waiver of constitutional protections, that reasoning would render Fourth Amendment protections meaningless.

State v. *Fierro*, 853 N.W.2d 235, 241–242 (S.D. 2014); *Byars* v. *State*, 336 P.3d 939, 945–946 (Nev. 2014).

Thus, the State may not rely on an implied-consent statute to supply irrevocable Fourth Amendment consent that overrides a conscious individual's actual refusal at the scene. There is no reason for a different rule when the individual is unconscious. Given that consent to a blood test at the scene must be voluntary, *Birchfield*, 136 S. Ct. at 2185–2186, and a significant number of conscious individuals refuse to provide that consent, the State should not be permitted to use an implied-consent statute to supply consent that overrides an unconscious individual's inability to consent or refuse at the scene.

3. Petitioner's unconscious blood draw cannot be justified on the ground that driving is analogous to a pervasively regulated business.

Throughout its opinion, the three-justice plurality of the Wisconsin Supreme Court analogized driving to a "pervasively regulated business." J.A. 17–18 (citing *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970)). This Court has upheld statutes authorizing warrantless regulatory inspections of certain "closely regulated" industries that have long been "subject to close supervision and inspection." *Colonnade*, 397 U.S. at 74, 77.[10] The plurality reasoned that driving is

[10] *Colonnade* involved the liquor industry. The other industries that fall within this narrow exception to the warrant requirement are firearms dealers, *United States* v. *Biswell*, 406 U.S. 311 (1972), vehicle junkyards, *New York* v. *Burger*, 482 U.S. 691 (1987), and mines, *Donovan* v. *Dewey*, 452 U.S. 594 (1981).

heavily regulated, and that as a result, voluntary consent to warrantless searches may be inferred from a motorist's decision to drive against that regulatory backdrop. J.A. 17–18, 28.

The "pervasively regulated business" exception has no application here, however, because it does not rest on any theory of consent. Rather, the Court has held that the government may impose such searches, regardless of consent, because the relevant "industries have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise." *Barlow's*, 436 U.S. at 313 (internal citation omitted)); see also *Burger*, 482 U.S. at 701; *Biswell*, 406 U.S. at 316; *Colonnade*, 397 U.S. at 75. To be sure, the Court has emphasized that industry participants are on notice that they will generally be subject to extensive regulation, but it has made that point only to explain why there is no reasonable expectation of privacy. See, *e.g.*, *Biswell*, 406 U.S. at 316; *Donovan*, 452 U.S. at 600. The Court has not relied on a voluntary-consent theory to justify these warrantless searches.[11]

In addition, the Court has repeatedly declined to expand the "pervasively regulated business" doctrine beyond the narrow circumstances in which it first arose. The Court explained in *Barlow's* that "[t]he clear import of our cases is that the closely regulated

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[11] In addition, even the closely regulated industry cases do not go as far as the State needs the Court to go here. The provisions authorizing inspections in those cases merely create penalties for denying entry to inspectors; they do not authorize inspectors to enter the premises regardless of lack of consent. See *Donovan*, 452 U.S. at 596–597; *Burger*, 482 U.S. at 694 n.1; *Colonnade*, 397 U.S. at 76.

industry * * * is the exception." 436 U.S. at 313. As a result, regulations to which the general public is subject are not sufficient to invoke the doctrine. *Ibid.* In *Patel*, for instance, the Court declined to categorize the hotel industry as a "closely regulated industry," reasoning that "[t]o classify hotels as pervasively regulated would permit what has always been a narrow exception to swallow the rule." 135 S. Ct. at 2455. So too here: treating driving as a pervasively regulated industry would expand the exception to one of the most routine activities of everyday life, subjecting hundreds of millions of people to warrantless searches.

II. The Fourth Amendment does not permit the state to impose an unconscious warrantless blood draw as a condition of driving.

For the reasons stated above, petitioner's blood draw may not be justified on the basis of consent. The State also may not simply impose a warrantless blood draw while unconscious as a condition of driving in the State. Such conditions must be reasonable under the Fourth Amendment, in that the intrusion on privacy must be outweighed by the legitimate government interests in the search. An unconscious blood draw is an unreasonable condition. As this Court has already concluded, the intrusion on privacy occasioned by a blood draw is significant — and the severity of that intrusion is exacerbated by the fact that the individual is incapacitated at the time. Conversely, the law enforcement interests served by drawing blood without a warrant are slight, and the ability to obtain reliable BAC evidence will not be hindered by requiring a warrant.

A. Search conditions must be reasonable.

In *Birchfield*, this Court held that the Fourth Amendment imposes a "limit" on the conditions that the State may place on the privilege of driving. 136 S. Ct. at 2185. The Court explained that the "limit" is one of reasonableness, "since reasonableness is always the touchstone of Fourth Amendment analysis." *Id.* at 2186. Determining whether a condition is reasonable thus turns on whether imposing the condition is supported by a balancing of individual privacy interests against legitimate law enforcement needs. *Id.* at 2176. That is the same inquiry that the Court has used in evaluating the reasonableness of searches imposed as a condition of accepting certain government benefits such as employment or parole. There, the Court has "assess[ed], on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Samson* v. *California*, 547 U.S. 843, 854–856 (2006); *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 652–653 (1995); *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 668 (1989); accord U.S. Amicus Br. 21, *Birchfield*, *supra*.

B. Imposing an unconscious blood draw as a condition of driving is unreasonable.

The intrusion on individual privacy interests occasioned by an unconscious blood draw is great, and the law enforcement interests served by a warrantless blood draw are slight. The Fourth Amendment therefore does not permit the government to impose unconscious blood draws as a condition of the privilege of driving.

1. A blood test is a significant intrusion.

As this Court has recognized, blood tests are a significant bodily intrusion that "require piercing the skin and extract[ing] a part of the subject's body." *Birchfield*, 136 S. Ct. at 2178 (citation omitted); accord *McNeely*, 569 U.S. at 148. "In light of our society's concern for the security of one's person, it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable." *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989). In addition, a blood test "places in the hands of law enforcement authorities a sample that can be preserved," and that can be used to garner additional information about the subject. *Birchfield*, 136 S. Ct. at 2178; see also *Skinner*, 489 U.S. at 616.

The fact that the motorist is unconscious does not alleviate, and may even exacerbate, the intrusion of a blood test. Although unconsciousness spares the individual from the pain and unpleasantness of the blood draw itself, the physical or mental sensations of undergoing a blood draw are not what make the intrusion "significant." As this Court has repeatedly observed, blood draws are "commonplace" and typically involve "virtually no risk, trauma, or pain." *McNeely*, 569 U.S. at 159 (citing *Schmerber* v. *California*, 384 U.S. 757, 771 (1966)). Instead, the violation of privacy arises from the state's "piercing the skin" to "extract a part of the subject's body." *Birchfield*, 136 S. Ct. at 2178 (citation omitted). This violation of privacy is the same whether the motorist is conscious while it occurs, or whether he instead becomes aware, sometime after awaking, that the State has been inside his skin. Indeed, the sense of having been powerless to advocate

for oneself in the face of a bodily intrusion undertaken for law enforcement purposes is in itself a substantial intrusion on one's sense of dignity and autonomy. See *Winston* v. *Lee*, 470 U.S. 753, 765 (1985) (surgery under general anesthesia at the behest of law enforcement "involves a virtually total divestment of respondent's ordinary control over surgical probing beneath his skin" and is therefore more "demeaning" and "intrusive" than surgery for medical purposes).[12]

2. The law enforcement interest in proceeding without a warrant is slight.

Conversely, the law enforcement interest in performing a blood test on unconscious driver without a warrant is slight. Requiring a warrant to draw blood from unconscious drivers poses little risk of impeding the state's ability to obtain reliable BAC evidence. As the *McNeely* Court recognized in discussing blood draws of conscious drivers, although BAC evidence dissipates over time, it does so in a "gradual and relatively predictable manner," and police will often be able to obtain a warrant in the time it takes to obtain the blood draw. 569 U.S. at 153–156. In situations in which securing a warrant would threaten the ability to obtain reliable BAC evidence, officers may rely on

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[12] This Court held in *Breithaupt* v. *Abram*, 352 U.S. 432, 437 (1957), that a nonconsensual blood test performed while the subject was unconscious was not "conduct that shocks the conscience" and therefore did not violate the Due Process Clause. The Court subsequently held, however, that a blood test is a "significant intrusion" for purposes of the distinct privacy interests protected by the Fourth Amendment. *Birchfield*, 136 S. Ct. at 2178; *McNeely*, 560 U.S. at 148.

the exigent circumstances exception to dispense with the warrant. *Id.* at 156.

a. Advances in technology have substantially reduced the time and effort necessary to obtain a warrant. The federal government and almost all States, including Wisconsin, allow police officers to obtain warrants remotely, by means of a telephone, radio, fax, or email.[13] *McNeely*, 569 U.S. at 154; Wis. Stat. § 968.12(3) ("A search warrant may be based upon sworn oral testimony communicated to the judge by telephone, radio or other means of electronic communication, under the procedure prescribed in this subsection."); Fed. R. Crim. P. 41. In many jurisdictions, including in Wisconsin, judges are on call to grant warrants remotely, including in the middle of the night. See, *e.g.*, *State* v. *Schultz*, 379 Wis. 2d 768 (2017); *State* v. *Kerr*, No. 2016AP1766-CRNM, 2017 WL 1628519, at *3 (Wis. Ct. App. Apr. 28, 2017). Warrants can therefore be obtained expeditiously, often in 15 minutes or less. *Riley* v. *California*, 573 U.S. 373, 401 (2014) ("Recent technological advances similar to those discussed here have, in addition, made the process of obtaining a warrant itself more efficient."); *McNeely*, 569 U.S. at 172 (Roberts, C.J., concurring).

At the same time, "some delay between the time of the arrest or accident and the time of the [blood] test is inevitable regardless of whether police officers are

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[13] Forty-five States have electronic or telephonic warrant procedures. Elaine Borakove & Rey Banks, Justice Management Institute, *Improving DUI System Efficiency: A Guide to Implementing Electronic Warrants* 8–9, 68–76, https://www.responsibility.org/wp-content/uploads/2018/04/FAAR_3715-eWarrants-Interactive-PDF_V-4.pdf?pdf=eWarrants_Implementation_Guide (accessed Feb. 20, 2019).

required to obtain a warrant," because "a police officer must typically transport a drunk-driving suspect to a medical facility and obtain the assistance of someone with appropriate medical training before conducting a blood test." *McNeely*, 569 U.S. at 153; *id.* at 171–172 (Roberts, C.J., concurring). That is particularly true in the case of unconscious suspects, who may have been injured in a crash, and whose unconsciousness provides an independent reason to transport them to a medical facility. In other words, even in jurisdictions that employ roadside blood testing or phlebotomists at the police station, *id.* at 157, the police ordinarily cannot avoid transporting unconscious suspects to a medical facility.

In addition to transportation time, the medical facility will take some time actually to perform the blood draw. Case studies indicate that the entire process may sometimes take up to two or three hours. NHTSA, *Use of Warrants for Breath Test Refusal: Case Studies* 17 (Oct. 2007) (describing practices in Michigan); NHTSA, *Use of Warrants to Reduce Breath Test Refusals: Experiences from North Carolina* 11 (2011) (transportation to hospital and completion of blood draw in one North Carolina County took between 20 and 40 minutes).[14] As a result, many States, including Wisconsin, have anticipated some delay between the offense and a blood draw, drafting their statutes either to define the drunk-driving offense as involving a certain BAC level two to four hours after driving, or to

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[14] In this case, for instance, approximately an hour elapsed between petitioner's arrest and his arrival at the hospital, most of which was spent at the police station, before officers decided to have his blood drawn. J.A. 109–113. Petitioner then appears to have waited for at least 35 minutes at the hospital before his blood was actually drawn. J.A. 112, 118–119.

permit reliance on BAC evidence taken within two to four hours after driving. *State* v. *Mechler*, 153 S.W.3d 435, 445–446 & nn.18–20 (Tex. Crim. App. 2005) (Cochran, J., concurring); see, *e.g.*, Ariz. Rev. Stat. § 28-1381(A)(2) (2012) (two hours); Ga. Code § 40-6-391(a)(5) (2011) (three hours); Mich. Comp. Laws § 257.625a(6)(a); Wis. Stat. § 885.235(1g).

In sum, law enforcement officers ordinarily will be able to obtain a warrant expeditiously — often within the time it takes to transport an unconscious driver to a medical facility and wait to have his blood drawn. Even before *McNeely*, States experimenting with obtaining remote warrants before performing blood tests on conscious drivers found that the extra time involved (as compared to performing a warrantless *breath* test) did not adversely affect officers' ability to obtain reliable BAC evidence. *Use of Warrants for Breath Test Refusal, supra*, at vi–vii (describing case studies in Arizona, Michigan, Oregon, and Utah).

In situations in which an officer has a legitimate concern that obtaining a warrant will hinder the ability to recover reliable BAC evidence from an unconscious driver, he will be able to invoke the exigent circumstances exception. In applying that exception, courts have deferred to an officer's reasonable estimation that the delay involved in obtaining a warrant would risk allowing the BAC evidence to dissipate. See, *e.g.*, *State* v. *Chavez-Majors*, 402 P.3d 1168, 1184 (Kan. Ct. App. 2017). Courts have also recognized that when an individual is unconscious because of injury, the time necessary to treat the individual at the scene and attend to the scene of the accident may create exigent circumstances that justify dispensing with a warrant. See, *e.g.*, *Brumbley* v. *State*, No. 1106, 2016

WL 197104, at *8 (Md. Ct. Spec. App. Jan. 15, 2016); *State* v. *Kiger*, 105 N.E.3d 751, 759 (Ohio Ct. App. 2018). Here, of course, the State rightly never asserted that exigent circumstances were present, given that petitioner was held at the police station for nearly an hour (during which time he lost consciousness) before officers even decided to have a blood draw performed. J.A. 109–113. But the fact remains that as a general matter, the exigent-circumstances exception provides an effective backstop that ensures that the need to obtain a warrant will not hinder the State's interest in obtaining BAC evidence.

b. The burden of obtaining a warrant is further reduced by the fact that since *McNeely*, law enforcement officers have had to obtain warrants before drawing the blood of conscious drivers (at least absent exigent circumstances). *McNeely* thus "routinized the practice of obtaining a warrant," and, indeed, enabled some jurisdictions to use blood tests more regularly. Victoria A. Terranova & Joycelyn Pollock, *DUI Enforcement after* Missouri v. McNeely, 52 No. 1 Crim. Law Bulletin Art. 5 (2016). In many cases, law enforcement agencies have instituted procedures designed to facilitate that practice, and officers have become familiar with, and proficient at, quickly obtaining warrants. See, *e.g.*, *ibid.* ("Since the ruling, police departments have formalized this process through training and implementation of guidelines for blood draw warrant procedures and streamlined the practice of obtaining a warrant."); *Flonnory* v. *State*, 109 A.3d 1060, 1062 n.5 (Del. 2015) (after *McNeely*, the state "instructed law enforcement officers to apply for a search warrant under all circumstances before performing a blood draw"); *Espinoza* v. *Shiomoto*, 10 Cal. App. 5th 85, 94

(2017) (referring to post-*McNeely* policy of seeking warrants in felony DUI cases).

Including unconscious drivers within the existing practice of obtaining warrants before drawing blood should not impose any material additional burden on law enforcement. Although statistics on the incidence of DUI arrest involving an unconscious person do not appear to be readily available, this Court observed in *Birchfield* that "we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be." 136 S Ct. at 2184–2185. To be sure, the States that maintain unconscious-driver statutes have concluded that the situation merits legislation. But appellate courts in several States have already held that warrants are required when the driver is unconscious, and there is no indication that law enforcement has had difficulty complying with those decisions.[15]

c. Requiring a warrant in the case of unconscious drivers will serve important public purposes. First, warrants will ensure that a neutral judicial officer has the opportunity to evaluate the sufficiency of the asserted probable cause before the blood test is performed. When a driver is conscious, there are well-es-

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[15] *People* v. *Arredondo*, 199 Cal. Rptr. 3d 563, 574 (2016), *review granted and opinion superseded*, 371 P.3d 240 (Cal. 2016); *Bailey* v. *State*, 790 S.E.2d 98, 104 (Ga. Ct. App. 2016), *overruled on other grounds by Welbon* v. *State*, 799 S.E.2d 793 (Ga. 2017); *State* v. *Ruiz*, 545 S.W.3d 687, 693 (Tex. App. 2018), *review granted* (Apr. 25, 2018); *Myers*, 164 A.3d at 1172; *State* v. *Havatone*, 389 P.3d 1251, 1255 (Ariz. 2017); *State* v. *Romano*, 800 S.E.2d 644, 648 (N.C. 2017); *State* v. *Dawes*, No. 111310, 2015 WL 5036690, at *5 (Kan. Ct. App. Aug. 21, 2015) (unpublished).

tablished initial tests that are generally used to establish probable cause — preliminary breath tests, for instance, or having the driver recite the alphabet backwards — and the probable-cause showing will be based primarily on the officer's observations. *Birchfield*, 136 S. Ct. at 2181. But officers cannot rely on these tests when the driver is unconscious. Rather, they must identify other indicia of intoxication, such as the individual's behavior or manner of driving before he was stopped or before he became unconscious, the smell of alcohol on the individual, or the presence of alcohol in the car. *E.g.*, *State* v. *Merwin*, No. 1 CA-CR 16-0260, 2017 WL 4129182, at *4 (Ariz. Ct. App. Sept. 19, 2017) (probable cause based on odor of alcohol and eyewitness accounts of driving before crash). This evidence will vary from case to case, and it may often include the observations of witnesses other than the officers themselves. As a result, warrants have a particularly important role to play, as they will "ensure[] that the inferences to support a search are 'drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" *Riley* v. *California*, 573 U.S. 373, 382 (2014) (quoting *Johnson* v. *United States*, 333 U.S. 10, 14 (1948)).

Relatedly, the warrant requirement serves the salutary purpose of assuring citizens that the State will not perform blood tests on unconscious individuals without any supervision by a neutral magistrate. A driver who is unconscious is unable to refuse a blood test at the scene or otherwise advocate for himself. That incapacitation renders the prospect of the state-sponsored bodily intrusion more concerning. Requiring a warrant ensures that law enforcement officers do not order blood tests of unconscious individuals as a

matter of course, and that when they do so, a magistrate has determined the existence of probable cause and the scope of the search. *McNeely*, 569 U.S. at 174 (Roberts, C.J., joined by Alito and Breyer, JJ., concurring) ("Requiring a warrant whenever practicable helps ensure that when blood draws occur, they are indeed justified.").

* * *

In sum, any law enforcement interest in performing blood draws on unconscious individuals without first obtaining a warrant is outweighed by the substantial intrusion on weighty privacy interests that such tests impose. The State therefore may not impose such blood draws as a condition of driving.

III. Petitioner's blood test may not be justified as a search incident to arrest.

In its opposition to certiorari, respondent raised the argument (not briefed below) that the drawing of petitioner's blood while he was unconscious could be upheld on the alternative ground that it was a search incident to arrest that does not require a warrant. This Court effectively rejected this contention three years ago in *Birchfield*.

Birchfield held that while a breath test is a reasonable search incident to the arrest of a suspected drunk driver, a blood test is not. 136 S. Ct. 2184. In reaching this conclusion, the Court applied the same balancing test used in determining the reasonableness of a search imposed as a condition of accepting certain government benefits, see p. 37, *supra*, which involves "assessing, on the one hand, the degree to which [the

search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* at 2176 (quoting *Riley*, 573 U.S. 373, 385 (2014)).

This balancing weighed in favor of allowing warrantless breath tests because they do not "implicate significant privacy concerns" and "the need for BAC testing is great." *Id.* at 2176 (citing *Skinner*, 489 U.S. at 626); *id.* at 2184. Blood tests, however, were "a different matter" because they are "significantly more intrusive": a "compelled physical intrusion beneath the defendant's skin and into his veins." *Id.* at 2178 (citing *McNeely*, 569 U.S. at 148). The Court concluded that the State's interest in obtaining BAC results could not justify imposing this procedure on motorists without a warrant. *Id.* at 2184.

This conclusion was informed by "the availability of the less invasive alternative of a breath test" for obtaining BAC evidence from suspected drunk drivers. *Id.* The Court recognized, however, that there may be circumstances in which a breath test is ineffective or unavailable and a blood test is necessary — including when the driver is unconscious as a result of a crash or otherwise. *Id.* at 2184–2185. But the Court concluded that it "ha[d] no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be." *Id.* Thus, the Court has already weighed the interests at stake when the police wish to obtain BAC evidence from an unconscious driver, and has concluded that they favor requiring a warrant.

That conclusion is undoubtedly correct. As discussed, a blood draw is a significant intrusion on

legitimate privacy interests, particularly when performed on a person who is unconscious and therefore unable to observe the procedure or advocate for himself. See pp. 37–39, *supra*. At the same time, the State's interest in performing a warrantless blood draw is minimal. In light of advances in warrant procedures, requiring police to obtain a warrant before drawing blood from an unconscious driver is unlikely to impede their ability to obtain necessary evidence. See pp. 39–40, *supra*. Moreover, as this Court observed in *Birchfield*, there is nothing to suggest that unconscious drivers are so common that requiring a warrant would overburden the courts, 136 S. Ct. at 2184, and indeed, many jurisdictions already impose that requirement without significant disruption, see p. 44, *supra*. And, in cases where circumstances do not permit the police to obtain a warrant, they may rely on the exigent-circumstances exception to justify a warrantless blood draw. See pp. 42–43, *supra*; see also *Birchfield*, 136 S. Ct. at 2184 (noting that "[n]othing prevents the police from * * * relying on the exigent circumstances exception to the warrant requirement" when there is not enough time to seek a warrant for a blood test); *Riley*, 573 U.S. at 388 (noting that situations where particular facts render seeking a warrant unduly burdensome "are better addressed through consideration of case-specific exceptions to the warrant requirement, such as the one for exigent circumstances").

In short, this Court should reject the State's effort to create a new per se exception to the warrant requirement for blood tests of unconscious motorists suspected of drunk driving. Absent a showing of actual obstacles to a warranted search in a particular case —

that is, absent exigency — the proper procedure for obtaining a blood draw is "simple — get a warrant." *Riley*, 573 U.S. at 403.

CONCLUSION

For the foregoing reasons, the judgment of the Wisconsin Supreme Court should be reversed.

Respectfully submitted.

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GERALD P. MITCHELL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Writ of Certiorari to the
Supreme Court of Wisconsin

BRIEF OF THE RESPONDENT, STATE OF WISCONSIN

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QUESTION PRESENTED

In a state with an implied-consent statute for intoxicated motorists, is a warrantless blood draw of an unconscious driver for whom police have probable cause of operating under the influence an unlawful search under the Fourth Amendment?

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Wisconsin Stat. § 343.305(2) provides, in relevant part: "(2) IMPLIED CONSENT. Any person who . . . operates a motor vehicle upon the public highways of this state . . . is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances, controlled substance analogs or other drugs, or any combination of alcohol, controlled substances, controlled substance analogs and other drugs, when requested to do so by a law enforcement officer under sub. (3)(a) or (am) or when required to do so under sub. (3)(ar) or (b)."

Wisconsin Stat. § 343.305(3)(a) provides: "REQUESTED OR REQUIRED. (a) Upon arrest of a person for violation of s. 346.63(1), (2m) or (5) . . . a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine for the purpose specified under sub. (2). Compliance with a request for one type of sample

does not bar a subsequent request for a different type of sample."

Wisconsin Stat. § 343.305(3)(b) provides: "A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection, and if a law enforcement officer has probable cause to believe that the person has violated s. 346.63 (1), (2m) or (5) . . . one or more samples specified in par. (a) or (am) may be administered to the person."

Wisconsin Stat. § 343.305(4) provides: "INFORMATION. At the time that a chemical test specimen is requested under sub. (3) (a), (am), or (ar), the law enforcement officer shall read the following to the person from whom the test specimen is requested:

'You have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, or both, or you are the operator of a vehicle that was involved in an accident that caused the death of, great bodily harm to, or substantial bodily harm to a person, or you are suspected of driving or being on duty time with respect to a commercial motor vehicle after consuming an intoxicating beverage.

This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your

operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.'"

Wisconsin Stat. § 343.305(5)(b) provides: "Blood may be withdrawn from the person . . . only by a physician, registered nurse, medical technologist, physician assistant, phlebotomist, or other medical professional who is authorized to draw blood, or person acting under the direction of a physician."

STATEMENT OF THE CASE

A. Legal background.

"Drunk drivers take a grisly toll on the Nation's roads, claiming thousands of lives, injuring many more victims, and inflicting billions of dollars in property damage every year." *Birchfield v. N. Dakota*, 136 S. Ct. 2160, 2166 (2016). Against that backdrop, "all 50 States have adopted implied consent laws." *Missouri v. McNeely*, 569 U.S. 141, 161 (2013) (plurality op.). Those laws are "legal tools" that States may use "to enforce their drunk-driving laws and to secure [blood alcohol concentration] BAC evidence without undertaking warrantless nonconsensual blood draws." *Id.* at 160–61.

Wisconsin's law, like other States', provides that "[a]ny person who . . . drives or operates a motor vehicle upon the public highways of this state . . . is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity . . . of alcohol [or] controlled substances" when requested by an officer with probable cause of driving under the influence. Wis. Stat. § 343.305(2), (3)(a).[1]

The officer reads a form (called Informing the Accused) that instructs the driver that submission to a test is being sought. The officer is required to inform a conscious person that, if the person submits and the analysis "shows more alcohol in [the person's] system than the law permits while driving," the person's operating privilege will be suspended and the results may be used in court. Wis. Stat. § 343.305(4). If the driver refuses to submit, then that comes with consequences: "[i]f you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties." A refusal also may be used against the person in court. Wis. Stat. § 343.305(4).

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[1] The Wisconsin Supreme Court has concluded that an arrest is not required for an officer to request a sample under Wisconsin's implied consent law. An officer may request a sample if there is probable cause that the person has operated a motor vehicle while under the influence of an intoxicant. *State v. Tullberg*, 857 N.W.2d 120, 135 (Wis. 2014).

This Court, in *Birchfield*, explained that the penalties for refusing a blood test may not include criminal ones but may include "civil penalties and evidentiary consequences on motorists who refuse to comply." 136 S. Ct. at 2165. Wisconsin's law conforms to that limit. *See Wisconsin v. Zielke*, 403 N.W.2d 427, 431 (Wis. 1987); Wis. Stat. § 343.305(10)(a).

The issue here concerns instances where the Informing-the-Accused interaction is not possible because the driver is unconscious. Wisconsin law provides that, when the intoxicated driver is "unconscious or otherwise not capable of withdrawing consent," he "is presumed not to have withdrawn consent." Wis. Stat. § 343.305(3)(b).[2] An officer with probable cause may proceed to administer the taking of a sample through a "medical professional." Wis. Stat. § 343.305(3)(b), (5)(b).

B. Background on impaired driving.

"No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990). In a given year, drunk

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[2] In Wisconsin, "[t]he word 'unconscious' is used to describe a person who is insensible, incapable of responding to sensory stimuli, or in a state lacking conscious awareness." *State v. Disch*, 385 N.W.2d 140, 144 (Wis. 1986). The Wisconsin Supreme Court has explained that "'not capable of withdrawing consent' must be construed narrowly and applied infrequently." *Id.*

driving takes 10,000 lives, or more, in the United States; that is about one death every 48 minutes.[3]

Like the rest of the country, Wisconsin feels its effect. For example, between 2003 and 2012, 2,577 people died in Wisconsin crashes involving a drunk driver, and fatality rates for all age groups exceeded the national average. The percentage of adults in Wisconsin who report intoxicated driving—3.1 percent—exceeded the national rate of 1.9 percent.[4] The harms continue: on average, there were about 200 alcohol-related fatalities in Wisconsin yearly between 2011 and 2015, and an average of 2,800 alcohol-related injuries each year.[5]

On top of this, drugged driving is on the rise. The country is suffering from an opioid epidemic and emergency room visits have risen dramatically due to

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[3] *Drunk Driving*, U.S. Dep't of Transp., https://www.nhtsa.gov/risky-driving/drunk-driving (last visited Mar. 25, 2019); Nat'l Highway Traffic Safety Admin., *2007 Traffic Safety Annual Assessment – Alcohol-Impaired Driving Fatalities 1, Traffic Safety Facts: Research Note* (Dec. 2008), https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/811016.

[4] Ctrs. for Disease Control & Prevention, *Sobering Facts: Drunk Driving in Wisconsin* (Dec. 2014), https://www.cdc.gov/motorvehiclesafety/pdf/impaired_driving/drunk_driving_in_wi.pdf.

[5] *Final year-end crash statistics*, State of Wis. Dep't of Transp., https://wisconsindot.gov/Pages/about-wisdot/newsroom/statistics/final.aspx (last visited Mar. 25, 2019).

opioid overdoses.[6] And that is not the only drug that poses a threat. One recent study found "a large increase" in drugged driving, with "nearly one in four drivers test[ing] positive for at least one drug that could affect safety."[7] According to the Governors Highway Safety Association, from 2006 to 2016, the number of fatally-injured drivers who tested positive for drugs rose from 27.8% to 43.6%; of those fatally-injured drivers tested in 2016, 38% were positive for some form of marijuana, 16% for opioids, and 4% for both.[8]

It is documented that drugged and drunk drivers lose consciousness. For example, it takes only a quick search to find incidents like this recent one in Wisconsin: "the impaired motorist left a path of destruction in his wake. Officers found [the motorist] slumped over the wheel of his girlfriend's car around

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[6] Jacqueline Howard, *ER visits for opioid overdose up 30%, CDC study finds*, CNN (Mar. 6, 2018, 1:29 p.m.) https://www.cnn.com/2018/03/06/health/opioid-overdose-emergency-departments-cdc-study/index.html.

[7] Press Release, Nat'l Highway Traffic Safety Admin., NHTSA Releases Two New Studies on Impaired Driving on U.S. Roads (Feb. 6, 2015), https://one.nhtsa.gov/About-NHTSA/Press-Releases/nhtsa_releases_2_impaired_driving_studies_02_2015.

[8] Governors Highway Safety Ass'n, *Drug-Impaired Driving*, 7, 12 (May 2018), https://www.ghsa.org/sites/default/files/2018-05/GHSA_DrugImpairedDriving_FINAL.pdf.

3:50 a.m."[9] The available data shows that drunk drivers cited in Wisconsin have a "median alcohol concentration" of 0.16%.[10] According to the National Institutes of Health, a 0.16% blood alcohol concentration begins the range of "severe impairment" (between a ".16–.30%" blood alcohol concentration). One symptom for that range of impairment is "[l]oss of consciousness."[11]

Overdoses on opioids "lead to unconsciousness," too.[12] As Outagamie County, Wisconsin, officials recently reported, "We have . . . had numerous incidents in which officers responded to drug users (who were) unconscious in their vehicles after using drugs."[13] Here is a sampling of recent headlines about drugged unconscious drivers in Wisconsin: "Richfield

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[9] *Police Incident Reports*, City of Madison Police Dep't (Mar. 30, 2018, 9:49 a.m.), http://www.cityofmadison.com/police/newsroom/incidentreports/incident.cfm?id=20657.

[10] *Drunk driving arrests and convictions*, State of Wis. Dep't of Transp., https://wisconsindot.gov/Pages/safety/education/drunk-drv/ddarrests.aspx (last visited Mar. 25, 2019) (data for 2015).

[11] Nat'l Inst. On Alcohol Abuse, *Understanding the Dangers of Alcohol Overdose* (Oct. 2018), https://pubs.niaaa.nih.gov/publications/alcoholoverdosefactsheet/overdoseFact.pdf.

[12] *Opioid addiction*, U.S. Nat'l Library of Med. (Mar. 19, 2019), https://ghr.nlm.nih.gov/condition/opioid-addiction.

[13] Andy Thompson, *Drunk Driving Has Taken a Heavy Toll in Wisconsin. Now, Drugged Driving Is Gaining a Foothold*, Post Crescent (Appleton), (Sept. 3, 2018), https://www.postcrescent.com/story/news/2018/09/03/under-influence-drugged-drivers-rise-fox-valley-beyond/1142828002/.

man on opioids crashes car at Radisson Hotel"; "Unconscious man drives through neighborhood lawns after using heroin"; "Unconscious driver on I-43 overdosed on heroin"; and "Driver overdoses on heroin in van at rural Stoughton intersection," to cite a few.[14]

C. Factual background.

In May 2013, the Sheboygan County, Wisconsin, police received a call at 3:17 p.m. reporting concerning behavior by Gerald P. Mitchell. J.A. 100. Officer Alex Jaeger responded and spoke to Mitchell's neighbor, Alvin Swenson. J.A. 100. Swenson reported observing Mitchell as apparently "intoxicated or under the influence," and acting "very disoriented" and "stumbling." J.A. 101. This culminated in Mitchell

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[14] Adriana Ramirez, *Richfield Man On Opioids Crashes Car at Radisson Hotel in Menomonee Falls*, Milwaukee J. Sentinel, (Aug. 8, 2018), https://www.jsonline.com/story/communities/northwest/crime/police-reports/2018/08/08/richfield-man-crashes-car-radisson-hotel-menomonee-falls/929580002/; *Unconscious man drives through neighborhood lawns after using heroin*, WMTV, (Jan. 2, 2019, 8:02 p.m.), https://www.nbc15.com/content/news/MPD-Unconscious-man-drives-through-neighborhood-lawns-after-using-heroin-503826041.html; *Police: Unconscious driver on I-43 overdosed on heroin*, WTMJ-TV, (last updated Mar. 23, 2018, 3:35 p.m.), https://www.tmj4.com/news/local-news/police-unconscious-driver-on-i-43-overdosed-on-heroin; *Driver overdoses on heroin in van at rural Stoughton intersection*, Channel 3000, (last updated Nov. 14, 2016, 1:42 a.m.), https://www.channel3000.com/news/local-news/driver-overdoses-on-heroin-in-van-at-rural-stoughton-intersection/155993931.

"nearly falling several times before getting into a gray minivan and driving away." J.A. 101.

About one-half hour later, the police found Mitchell. J.A. 103. Officer Jaeger again responded and observed that Mitchell's condition was consistent with what Swenson described. J.A. 105. "He was slurring his words. He had great difficulty in maintaining balance, nearly fell several times"; he required the help of officers to stay upright. J.A. 105. He also was shirtless, wet, and covered in sand. J.A. 105. Officer Jaeger further observed that Mitchell smelled strongly of intoxicants, and he was belligerent. J.A. 209. Another officer located Mitchell's minivan and found that it had minor, apparently fresh, damage. J.A. 107. And Officer Jaeger learned that Mitchell had prior convictions for operating while intoxicated. J.A. 106. Mitchell admitted to drinking both at his apartment and at the beach. J.A. 106. He said he parked his vehicle because he had been too drunk to drive. J.A. 106.

Officer Jaeger did not have Mitchell perform field sobriety tests because it would have been unsafe: Mitchell "could barely stand without being held." J.A. 107. He administered a preliminary breath test, which indicated a blood alcohol concentration of

0.24%.[15] J.A. 107–08. He arrested Mitchell for operating while intoxicated at 4:26 p.m. and put him in a squad car for transportation to police headquarters. J.A. 108–09, 113.

On the way to the police station, Mitchell's condition began declining, and he became more lethargic. J.A. 109–10. He had to be helped out of the squad car. J.A. 110. When Officer Jaeger placed Mitchell in a holding cell, Mitchell began to close his eyes and "sort of fall asleep or perhaps pass out," but would wake up with stimulation. J.A. 110.

In light of Mitchell's condition, Officer Jaeger concluded that an evidentiary breath test would be inappropriate, and he transported Mitchell to the hospital. J.A. 110. During the approximately eight-minute trip, Mitchell became "completely incapacitated" and would not wake up even when stimulation was applied (like shaking his arms or hands). J.A. 110. He was escorted into the hospital by wheelchair, where he then slumped over unable to lift himself. J.A. 111.

Officer Jaeger read the Informing the Accused form to Mitchell and requested a blood sample for evidentiary testing. J.A. 111–12. However, Mitchell

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[15] A preliminary breath test (PBT) is not an evidentiary test. It is a screening device that officers use to help determine whether to arrest a driver for operating a motor vehicle while under the influence of an intoxicant or with a prohibited alcohol concentration. Wis. Stat. § 343.303. Refusal to submit to a request for a PBT carries no consequences.

"was so incapacitated he could not answer." J.A. 112. A phlebotomist then obtained a blood sample from him at 5:59 p.m. J.A. 119–20. The test revealed a blood alcohol concentration of 0.222%. J.A. 220.

Officer Jaeger recalled that, as he waited for the phlebotomist to draw blood, "medical efforts were being attempted" and Mitchell was being monitored by hospital staff. J.A. 115, 119–20. Mitchell "couldn't answer any hospital staff," and he "did not awake[n] while they placed catheters or any other type of medical instruments on him." J.A. 115. Mitchell eventually was admitted to the hospital's intensive care unit. J.A. 128.

D. Procedural background.

The State charged Mitchell with seventh-offense operating a motor vehicle while under the influence of an intoxicant and seventh-offense operating a motor vehicle while having a prohibited alcohol concentration, as Mitchell had six prior operating while intoxicated convictions. R. 1; 14.

Mitchell moved to suppress the blood test results on the ground that his blood was improperly drawn without a warrant. R. 23. The trial court denied the motion. J.A. 137–40. A jury found Mitchell guilty, and he was sentenced to three years of initial confinement and three years of extended supervision. R. 52; 53; 65.

Mitchell appealed. R. 77. The Wisconsin Court of Appeals certified the case to the Wisconsin Supreme Court to decide "whether the warrantless blood draw

of an unconscious motorist pursuant to Wisconsin's implied consent law, where no exigent circumstances exist or have been argued, violates the Fourth Amendment." J.A. 61. The Wisconsin Supreme Court then affirmed Mitchell's conviction in a fractured opinion. J.A. 8–60.

The lead opinion concluded that Mitchell had "voluntarily consented to a blood draw by his conduct of driving on Wisconsin's roads and drinking to a point evidencing probable cause of intoxication." J.A. 10, 37. "[T]hrough drinking to the point of unconsciousness," that opinion explained, Mitchell forfeited his statutory opportunity under Wis. Stat. § 343.305(4) to withdraw his consent. J.A. 10, 37. It concluded that this mechanism was reasonable under the Fourth Amendment. J.A. 34.

The concurring opinion upheld the warrantless blood draw but on different grounds. Citing a confluence of circumstances—including unconsciousness, drunk driving, the "evanescent evidence," and "no less intrusive means"—the opinion concluded that the blood draw "on an unconscious individual who has been arrested for operating a motor vehicle while intoxicated . . . is reasonable within the meaning of the Fourth Amendment." J.A. 44–45.

A two-justice dissent concluded that "[c]onsent provided solely by way of an implied consent statute is constitutionally untenable," and found no other basis to support the search. J.A. 51.

Mitchell petitioned this Court for a writ of certiorari on the issue of "[w]hether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth amendment warrant requirement."

SUMMARY OF THE ARGUMENT

Drunk and drugged driving is an enormous public safety problem, and it is pernicious in Wisconsin. Yet it is everywhere; it takes a terrible national toll. The States must have tools to combat it, and every State does: implied consent. That implied consent makes a great deal of sense in the impaired driving context, where suspects often are, at a minimum, incoherent at the time police encounter them—indeed, at times, they are unconscious.

Wisconsin's implied consent statute is precisely the type of law that this Court has repeatedly endorsed, and upon which it has said that it casts no doubt. Mitchell, too, casts no doubt on implied consent, generally. Rather, he challenges a particular proviso, one that targets only a subset of drugged and drunk drivers: those that render themselves unconscious through intoxication or involvement in an impaired-driving crash. In other words, the law targets the most alarming and dangerous subset of all. This is not the time for the Court to deviate from its traditional support of implying consent for drunk and drugged drivers.

I. This Court has long recognized the validity of implied consent laws under the Fourth Amendment. It has not just upheld them but has endorsed them as valuable "legal tools to enforce [States'] drunk-driving laws." *McNeely*, 569 U.S. at 160 (plurality op.).

States may impose implied consent laws that "declare[ ] that any person operating a vehicle . . . is deemed to have consented to a chemical test of the alcoholic content of his blood if arrested for driving while intoxicated." *S. Dakota v. Neville*, 459 U.S. 553, 559 (1983). In *McNeely*, the Court approved of implied consent laws as an important "tool" and an alternative to nonconsensual blood draws. 569 U.S. at 160–61 (plurality op.). In *Birchfield*, the Court reaffirmed the laws' general validity, only recognizing a limit on what penalties may flow from a refusal: "It is another matter . . . for a State . . . to impose criminal penalties on the refusal to submit to such a test." 136 S. Ct. at 2185. The Court made clear that "nothing we say here should be read to cast doubt on" implied consent impaired driving laws more generally. *Id.*

Wisconsin's implied consent statute is valid under *Neville*, *McNeely*, and *Birchfield*, as it deems a driver to have consented to a blood draw if there is probable cause that he drove while impaired. If the driver refuses to submit and withdraws his consent, his operating privilege may be revoked, but there are no criminal penalties. That is what *Birchfield* allows.

II. Mitchell does not challenge implied consent impaired driving laws, generally. Rather, he believes that the traditional approval of those laws should not encompass the impaired driver who is unconscious. The Court should reject that view. Implied consent applies equally to the unconscious driver: he already has consented to the search. Further, even if consent were not conclusive, this Court should uphold the search as a reasonable and limited condition that comes with the privilege of driving.

A. Consent is favored, and a "search authorized by consent is wholly valid." *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973). It is not a rigid concept. For example, consent need not be verbalized and may occur through actions. It may be inferred.

The Court has approved of implied consent intoxicated driving laws. Those laws, on their faces, provide that a person consents to a search. They provide "consent to . . . tests." Wis. Stat. § 343.305(2). This Court has recognized that states may "declare[ ] that any person operating a vehicle . . . is deemed to have consented to a chemical test of the alcoholic content of his blood if arrested for driving while intoxicated." *Neville*, 459 U.S. at 559. It continues to recognize that this is inferred consent. As the Court reaffirmed in *Birchfield*, when discussing implied consent, "sometimes consent to a search need not be express but may be fairly inferred from context." 136 S. Ct. at 2185. That statement referenced with approval consent inferred both from conduct and from

a choice to participate in a specially restricted activity.

Becoming unconscious changes nothing about that consent analysis. The unconscious intoxicated motorist already has impliedly consented. He may, either before becoming unconscious or if he awakens, withdraw his consent. But the Constitution does not require a State to afford the opportunity for him to withdraw it.

Continuing to imply consent in these circumstances makes especially good sense because the law is narrowly targeted. It allows police to take evidence of intoxication only, and only from an intoxicated unconscious motorist who has created the dangerous situation. Holding otherwise would grant a motorist intoxicated to the point of unconsciousness greater rights. That should not follow, especially since the implied consent flows directly from that driver's own choices.

B. While this Court should hold that Mitchell's blood draw was valid because he consented, that is not the only path. "The touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991).

As Mitchell recognizes, the search may be valid if it is a reasonably imposed "condition of accepting certain government benefits." Pet'r's Br. 37. Indeed, there is a tradition of upholding searches where, as here, it is a narrow condition on a public privilege or

participation in a highly-regulated field. This case presents an intersection of those justifications. The search concerns not only the highly-regulated act of driving but also the heavily-scrutinized area of intoxicants.

Under the reasonableness test, this Court weighs the promotion of legitimate governmental interests against the degree to which the search intrudes upon an individual's privacy. There should be no serious question how that balance tips here. Everyone agrees that drunk and drugged driving gives rise to a weighty government interest in combating it. And the unconscious intoxicated driver is an especially dangerous subset. Further, drug-impaired driving is on the rise, putting a growing set of opioid-addicted drivers on the road. The States need their "tools" to combat both the existing and growing problem.

There is little to put on the other side of the balance because a blood draw, in these circumstances, adds little intrusion, if any. An unconscious drunk or drugged driver likely will have his blood drawn by medical professionals, no matter what. Further, he will sense none of it.

Mitchell's view that a warrant must issue does not grapple with those realities, or with what use a warrant truly would serve. Probable cause in these scenarios will not be subject to serious dispute, and the warrants will be identical in scope. On the other hand, requiring the steps needed to obtain a warrant poses real concerns. Police likely will need time to

assess the unconscious driver's state and any injuries to others, and to secure the scene. Delay means evidence is disappearing and, in these cases, any time lost may lead to serious medical consequences for the unconscious driver. An officer should be able to focus on that, and not on obtaining a warrant that will serve no demonstrable purpose.

The balance strongly favors the reasonableness of the narrow condition imposed here.

III. Lastly, this case provides an opportunity for the Court to revisit *Birchfield*'s search incident to arrest analysis in the context of an unconscious driver. There, in dicta, the Court commented that an unconscious intoxicated driver could not have his blood drawn incident to arrest. Now that the Court is faced with an unconscious driver, it should conclude otherwise. The key reasons that this Court gave for distinguishing a breath test from a blood test for the *conscious* driver would not apply here.

ARGUMENT

This Court has long recognized the problem of drunk and drugged driving in the United States. Intoxication causes "slaughter on our highways." *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957). That was true in 1957 and remains true today. It continues "to exact a terrible toll on our society," *McNeely*, 569 U.S. at 160 (plurality op.), and "a grisly toll on the Nation's roads." *Birchfield*, 136 S. Ct. at 2166.

Every State seeks to combat this. Each has, like Wisconsin, enacted laws prohibiting the operation of a motor vehicle by a person under the influence of alcohol or drugs. Important to those laws is implied consent. The implied consent statutes are "legal tools to enforce [States'] drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws." *McNeely*, 569 U.S. at 160–61 (plurality op.). When the statute's conditions are met, a person driving on a public highway is deemed to have given consent to provide a sample of his blood, but only if there is probable cause that he operated under the influence. Wis. Stat. § 343.305(2), (3)(a). If the person refuses, his operating privilege is revoked and the refusal may be used in court. Wis. Stat § 343.305(4).

None of that is questioned here, and for good reason. This Court has confirmed the validity of the implied consent mechanism. The question here is what difference it should make that the consent may apply to an *unconscious* intoxicated motorist; he "is presumed not to have withdrawn consent." Wis. Stat. § 343.305(3)(b). Wisconsin submits that adding unconsciousness into the equation should make no difference.

I. This Court has long upheld implied consent laws, like Wisconsin's, under the Fourth Amendment.

The Court has approved of drunk driving implied consent laws, like Wisconsin's, for decades. Implied consent laws have existed since at least 1949.

See Breithaupt, 352 U.S. at 435 n.2. Today, all 50 states have them. *Birchfield*, 136 S. Ct. at 2169; *McNeely*, 569 U.S. at 161 (plurality op.).

The Court recognizes that States may impose implied consent laws that, for example, "declare[ ] that any person operating a vehicle . . . is deemed to have consented to a chemical test of the alcoholic content of his blood if arrested for driving while intoxicated." *Neville*, 459 U.S. at 559. While this Court's decisions have recognized a limit—a State may not criminalize withdrawing consent for a blood sample—it has not disavowed the concept of implied consent. Far from it.

In *McNeely*, the Court ratified implied consent laws as an alternative to nonconsensual blood draws. *McNeely* first considered whether a blood draw was justified as a *per se* exigency, and concluded it was not. *McNeely*, 569 U.S. at 165. That holding did not implicate consent because McNeely had withdrawn his: "McNeely . . . refused." *Id.* at 146.

McNeely did not just leave implied consent intact; it endorsed it. The Court recognized that the implied consent regime served to fill the gap that nonconsensual blood draws did not. "States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws." *Id.* at 160–61 (plurality op.). The specific tool was implied consent: "all 50 States have adopted implied consent laws that require motorists,

as a condition of operating a motor vehicle within the State, to consent to BAC testing." *Id.* at 161.

In *Birchfield*, this Court reaffirmed the general concept of implied consent in impaired driving laws. The opinion reflects that a state may "deem[ ]" a person "to have consented," in the first instance. 136 S. Ct. at 2185. The Court was concerned with criminal consequences flowing from withdrawal of that consent: "It is another matter, however, for a State *not only* to insist upon an intrusive blood test, *but also* to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." *Id.* (emphasis added). These statements reflect a limit on the consequences that may flow from a refusal to submit, but properly recognize that, absent that refusal, the motorist has impliedly consented.

Wisconsin's implied consent statute is valid under *Neville*, *McNeely*, and *Birchfield*. The law deems a person to have consented to a blood draw if there is probable cause that he operated a motor vehicle while under the influence of an intoxicant and the officer requests a sample. Wis. Stat. § 343.305(2), (3)(a). That officer need not ask the person for consent because it already is implied. *Birchfield*, 136 S. Ct. at 2185. If the driver refuses to submit and withdraws his consent, his operating privilege may be revoked. *Id.* But Wisconsin's law imposes no criminal penalties.

This is the type of regime that the Court has approved, most recently in *Birchfield*. A state law may deem an intoxicated driver to have impliedly consented to a blood draw, so long as refusal to submit is not a criminal offense. *Birchfield*, 136 S. Ct. at 2185.

II. The implied consent law's application to an unconscious intoxicated driver is valid either as a consent search, or as a reasonable condition to combat intoxicated driving.

Mitchell does not seek to challenge the statutory implied consent mechanism as it applies to a conscious driver. However, he believes the Fourth Amendment is offended when that driver loses consciousness. It is not. Drinking to the point of unconsciousness should not augment one's rights. It is entirely reasonable to continue to imply consent for those who have rendered themselves unconscious through drinking—indeed, they are the most dangerous drivers.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. It further provides that warrants shall not issue without probable cause, but "does not specify when a search warrant must be obtained." *Birchfield*, 136 S. Ct. at 2173 (quoting *Kentucky v. King*, 563 U.S. 452, 459 (2011)). This Court "has inferred that a warrant must usually be secured." *Id.* (quoting *King*, 563 U.S. at 459).

There are prominent exceptions to that rule, two of which are applicable here. The Fourth Amendment was not offended because, *first*, Mitchell's search was done pursuant to consent and, *second*, it was a reasonable condition of driving on the public roads to combat the dangers of impaired driving. For either reason, the search should be upheld.

A. Through the implied consent law, Mitchell provided valid consent under the Fourth Amendment.

Fourth Amendment jurisprudence favors consensual searches, and this Court has long held that consent may take various forms. The consent exception flows from the Fourth Amendment's touchstone—reasonableness. "[I]t is no doubt reasonable for the police to conduct a search once they have been permitted to do so." *Jimeno*, 500 U.S. at 250–51.

The Court has recognized the value of consent in Fourth Amendment encounters. In "a society based on law, the concept of agreement and consent should be given a weight and dignity of its own." *United States v. Drayton*, 536 U.S. 194, 207 (2002). Thus, the "community has a real interest in encouraging consent." *Schneckloth*, 412 U.S. at 243. It sometimes "may yield necessary evidence for the solution and prosecution of crime," and sometimes may ensure that "a wholly innocent person is not wrongly charged with a criminal offense." *Id.* Overall, the avenue of consent "may result in considerably less

inconvenience for the subject of the search." *Id.* at 228.

1. Voluntary consent may be inferred from context and does not require a knowing on-the-spot waiver.

For consent to pass muster, it must be "voluntarily given, and not the result of duress or coercion, express or implied." *Schneckloth*, 412 U.S. at 248. Voluntariness shall be determined from "all the circumstances." *Id.* at 248–49. Those circumstances may allow consent to be inferred.

For example, in *United States v. Ellis*, the Fifth Circuit held that the defendant gave voluntary implied consent to a search of his car on a naval air station. 547 F.2d 863, 865–66 (5th Cir. 1977). He consented by his issuance, acceptance, and display of a visitor's pass on his car, where the pass acknowledged a right to search the car. *Id.*; *see also Morgan v. United States*, 323 F.3d 776, 782 (9th Cir. 2003) (recognizing implied consent to searches on military bases); *McGann*, 8 F.3d at 1183 (a person's notice that certain conduct would subject him to search is one of multiple factors demonstrating implied consent).[16]

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[16] There are many other examples of consent being inferred. *E.g. United States v. Walls*, 225 F.3d 858, 863 (7th Cir. 2000) ("It is well established that consent may be manifested in a non-verbal as well as a verbal manner and her action in opening the door and stepping back to allow the entry was sufficient to convey her consent in these circumstances." (citation omitted)); *United States v. Jones*, 701 F.3d 1300, 1319–21 (10th Cir. 2012)

That kind of consent already has been recognized in the impaired driving setting. In the context of implied consent laws, the Court has reiterated that "[i]t is well established that a search is reasonable when a person consents," and that "sometimes consent to a search need not be express but may be fairly inferred from context." *Birchfield*, 136 S. Ct. at 2185 (citing *Florida v. Jardines*, 569 U.S. 1 (2013); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978)). In that context, the Court cited as illustrative *Barlow's* discussion of certain highly-regulated industries, including the liquor industry, in which a participant "in effect *consents* to the restrictions placed upon him." 436 U.S. at 313 (emphasis added) (citation omitted).[17]

(holding defendant impliedly consented to police entry into his home where police officer told defendant, "I'm here for your marijuana plants" and asked to search his house, and where the defendant turned and walked toward the door of his home and police followed); *United States v. Guerrero*, 472 F.3d 784, 786, 790 (10th Cir. 2007) (explaining that a "palms up" hand gesture, in response to a request for consent to search a car, may constitute implied consent to search).

[17] Mitchell asserts that *Barlow's* provides no support for consent here, Pet'r's Br. 27–28, but he ignores this Court's statement in *Birchfield* that cites it for just that. *Birchfield*, 136 S. Ct. at 2185. *Barlow's* suggested only that consent would not flow from a statute that applies indiscriminately to businesses, but it distinguished areas that are traditionally subject to special oversight, like the liquor industry. *Barlow's*, 436 U.S. at 313–14. Further, as discussed below, *Barlow's* also lends support for a separate point—that the search was a reasonable condition on driving to combat operating while intoxicated.

In all, invoking *McNeely*, the *Birchfield* Court reaffirmed "the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Birchfield*, 136 S. Ct. at 2185. It made clear that "nothing we say here should be read to cast doubt on" implied consent statutes. *Id.*

Mitchell attempts to recast implied consent laws as something else: he says they merely seek "to create conditions that encourage consent." Pet'r's Br. 17. However, that ignores both what the laws actually provide—they provide "consent to . . . tests"—and what this Court has stated—the laws are a version of consent "inferred from context." Wis. Stat. § 343.05(2); *Birchfield*, 136 S. Ct. at 2185.

Mitchell points out that Wisconsin's statute provides for an exchange between law enforcement and conscious drivers to ask whether they will submit to testing or potentially lose their operating privilege. In so doing, he misapprehends the purpose of that exchange. It is not to seek consent—that already happened—but rather to administer a test, with certain penalties at risk if the driver refuses to submit. It establishes the factual basis for the imposition of "civil penalties and evidentiary consequences on motorists who refuse to comply." *Birchfield*, 136 S. Ct. at 2185. But its function is not to secure the consent of the driver to a blood test.

Indeed, voluntary consent does not require a knowing waiver of rights at the time of the search. *Schneckloth*, 412 U.S. at 232–33. In *Schneckloth*, following a traffic stop, a police officer asked an occupant if he could search the car, and the man agreed. *Id.* at 220–22. Nothing in the record established that the man knew he could refuse consent. *Id.* at 221–22. The Ninth Circuit concluded that this mattered, but this Court disagreed.

Fourth Amendment consent is not akin to the waiver of trial rights, which, unlike consent, requires intelligent waiver. "Nothing, either in the purposes behind requiring a 'knowing' and 'intelligent' waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures." *Schneckloth*, 412 U.S. at 241. The Fourth Amendment "is not an adjunct to the ascertainment of truth"; it concerns the value our society places on the "right of each individual to be let alone." *Id.* at 242. There thus "is nothing constitutionally suspect in a person's voluntarily allowing a search," regardless of whether he had a "subjective understanding" that he could refuse consent. *Id.* at 230, 243.

Mitchell's other arguments against inferring consent rely on two inapt points: that a consideration of personal characteristics must be part of the consent analysis; and that a person must be aware of a law to consent. Neither is correct.

First, Mitchell suggests that Wisconsin's provision fails because a proper voluntary consent analysis includes consideration of a person's "age, level of education, and intelligence." Pet'r's Br. 25. Inferring consent here requires no such analysis.

In *Schneckloth*, this Court explained that the voluntariness question would consider age and the like, but that was when assessing whether the consent flowed from "duress or coercion." 412 U.S. at 226–27. That has no application to implied consent. The acts that imply consent have nothing to do with a person's age or other personality characteristics. That coercion or duress analysis makes no sense here.[18]

Not only is Wisconsin's statute not coercive under *Schneckloth*, it is not coercive under this Court's implied consent precedent: it does not criminalize a refusal. *Birchfield*, 136 S. Ct. at 2185. Thus, when Mitchell asserts that a "vast majority of state appellate courts" have questioned voluntariness in a way that is relevant here, he is incorrect. Pet'r.'s Br. 20 & n.1. His assertion both misunderstands the state

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[18] Likewise, police do not need to assess age or level of education for a person to impliedly consent to police walking up to a front door. *See Jardines*, 569 U.S. at 8–9. Rather, it might matter that a person decided to erect multiple "No Trespassing" signs or even a "medieval-style moat" prior to police arrival. *United States v. Carloss*, 818 F.3d 988, 1004 (10th Cir. 2016) (Gorsuch, J., dissenting).

cases and the relevant question.[19] What matters is that this Court requires no knowing on-the-spot waiver but simply forbids coercion. *See Schneckloth*, 412 U.S. at 230, 241, 243. Wisconsin's law is proper under that rubric.

Second, suggesting that it matters to consent, Mitchell contends that it is "highly unlikely" that a "typical person" in Wisconsin would know about the implied consent law. Pet'r's Br. 26.

As an initial matter, Mitchell offers no factual support for his premise. Rather, there is good reason to presume a general knowledge of driving laws. They are the laws that people interact with every day. For example, to lawfully drive on Wisconsin roads, drivers must obtain a license conditioned on an ability to demonstrate knowledge of Wisconsin's traffic laws. *See* Wis. Stat. §§ 343.05(3)(a), 343.07(1g).

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[19] For example, Mitchell cites pre-*Birchfield* cases addressing voluntariness where states criminalized refusal (*State v. Modlin*, 867 N.W.2d 609, 620 (Neb. 2015); *State v. Yong Shik Won*, 372 P.3d 1065, 1067 (Haw. 2015); *State v. Brooks*, 838 N.W.2d 563, 565 (Minn. 2013)); cases where *state law* imposes a "knowing" requirement (*People v. Arrendondo*, 199 Cal. Rptr. 3d 563, 570, 574 (Cal. Ct. App. 2016), *review granted and opinion superseded*, 371 P.3d 240 (Cal. 2016); *Yong Shik Won*, 372 P.3d at 1080); or other pre-*Birchfield* analyses or cases that turn at least in part on particular state law grounds (*Flonnory v. State*, 109 A. 3d 1060 (Del. 2015); *State v. Butler*, 302 P.3d 609, 613 (Ariz. 2013); *State v. Banks*, 434 P.3d 361, 363 (Or. 2019); *State v. Pettitjohn*, 899 N.W.2d 1, 38 (Iowa 2017)).

More fundamentally, Mitchell's legal assumption is unfounded. It is established that "[e]veryone is presumed to know the law." *United States v. Hodson*, 77 U.S. (1 Wall.) 395, 409 (1870). And, the general presumption of knowing the law makes especially good sense for the traffic laws. He again seems to have in mind intelligent waiver in a trial-rights sense, but that is not the test for implied consent. Pet'r's Br. 23. As explained above, *Schneckloth* supports that "voluntariness" could not be taken "literally to mean a 'knowing' choice"; it does not mandate a "subjective understanding." 412 U.S. at 224, 230.

2. The search of an unconscious impaired driver was valid under the consent exception.

Under Wisconsin law, "[a] person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent . . . , and if a law enforcement officer has probable cause to believe that the person [is intoxicated] one or more samples" may be taken. Wis. Stat. § 343.305(3)(b). Wisconsin is in good company: over half of the States have unconscious driver statutory provisions within their implied consent schemes.[20]

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[20] There are at least 27 states with provisions in force that apply to unconscious drivers. Ala. Code § 32-5-192(b) (2018); Alaska Stat. § 28.35.035(b) (2018); Ark. Code Ann. § 5-65-202(b) (2017); Colo. Rev. Stat. § 42-4-1301.1(8) (2014) (affirmed as constitutional in *People v. Hyde*, 393 P.3d 962, 972 (Colo. 2017)); 21 Del. C. § 2747 (2019); Fla. Stat. § 316.1932(1)(c) (2018) (affirmed as constitutional in *McGraw v. State*, 245 So. 3d 760,

Wisconsin's provision poses no new problem of constitutional concern. By the time the person is unconscious, implied consent is complete. A driver already has impliedly consented to a blood test if a specific circumstance arises: the police have probable cause of impaired driving. It is the same consent that authorizes the conscious driver's search approved by *Neville*, *McNeely*, and *Birchfield*.

Unconsciousness is no boon to a drunk driver's rights. That straightforward point is clear from cases in which this Court has confronted an unconscious motorist. In *Breithaupt v. Abram*, the Court observed that drawing blood from the unconscious intoxicated driver (who had caused a serious crash) did not offend a "sense of justice." 352 U.S at 435 (citing *Rochin v. California*, 342 U.S. 165 (1952)). It was not akin to stomach pumping, and there was nothing "brutal" or

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770 (Fla. Dist. Ct. App. 2018), *granted and review pending*, No. SC 18-792, 2018 WL 3342880 (Fla. July 9, 2018)); 625 Ill. Comp. Stat. 5/11-501.1(b) (2016); Iowa Code Ann. § 321J.7 (2019); Ky. Rev. Stat. Ann. § 189A.103(2) (2018); La. Rev. Stat. § 32:661(B) (2018); Md. Code Ann., Cts. & Jud. Proc. § 10-305(c) (2018); Minn. Stat. Ann. § 169A.51(6) (2018); Mo. Rev. Stat. § 577.033 (2018); Mont. Code Ann. § 61-8-402(3) (2018); Neb. Rev. Stat. § 60-6,200 (2018); Nev. Rev. Stat. § 484C.160(3) (2017); N.H. Rev. Stat. § 265-A:13 (2018); N.M. Stat. Ann. § 66-8-108 (2019); Ohio Rev. Code § 4511.191(A)(4) (2017–18) (affirmed as constitutional in *State v. Speelman*, 102 N.E.3d 1185 (Ohio Ct. App. 2017), *review pending*); Okla. Stat. Ann. § 751(C) (2018); Or. Rev. Stat. § 813.140(2)(b) (2018); S.C. Code 1976 § 56-5-2950(A) (2018); Utah Code Ann. § 41-6a-522(a) (2018); 23 Vt. Stat. Ann. § 1202(a)(1)2 (2018); W. Va. Code Wyo. Stat. Ann. § 31-6-102(c) (2019).

"offensive" about a trained professional taking a blood sample. *Id.*

The *Breithaupt* Court observed that "the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right." *Id.* at 435. Indeed, "[i]t might be a fair assumption that a driver on the highways in obedience to a policy of the State, would consent to have a blood test made as a part of a sensible and civilized system protecting himself as well as other citizens not only from the hazards of the road due to drunken driving, but also from some use of dubious lay testimony." *Id.* n.2; *see also Schmerber v. California*, 384 U.S. 757, 766–67 (1966) (applying *Breithaupt* in the due process, Fifth Amendment, and Fourth Amendment setting).

Under implied consent, the unconscious intoxicated motorist has already consented. His unconsciousness adds nothing, and the drawing of blood offends no sense of justice. The result here should be the same as for conscious drivers who have not withdrawn their consent.

3. The State is not constitutionally required to afford unconscious drivers the opportunity to withdraw consent.

To avoid that result, Mitchell imagines a new right: to be afforded the opportunity to withdraw consent. Pet'r's Br. 21. There is no such right, and to create one here would mean that unconsciousness

enhances a driver's Fourth Amendment rights. This Court should reject that effort.

Mitchell's view conflates the fact that an individual may withdraw his consent with a nonexistent requirement that one must be afforded that opportunity. For consent to pass muster, it must be "voluntarily given" in the first instance, but it requires no intelligent waiver at the time of the search. *See Schneckloth*, 412 U.S. at 241, 248–49. Consent "may be withdrawn," but that withdrawal must actually be done. *United States v. Sanders*, 424 F.3d 768, 774 (8th Cir. 2005) (discussing *Jimeno*). Otherwise, consent continues and extends to what "would reasonably be understood." *Jimeno*, 500 U.S. at 252.[21]

Thus, when discussing a tenant's consent in *Georgia v. Randolph*, this Court observed that police need not "take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received." 547 U.S. 103, 121–22 (2006). In so holding, the Court adopted reasoning from a prior case where one tenant slept while police

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[21] A majority of the Wisconsin Supreme Court has declared that there is a constitutional right to be afforded the opportunity to withdraw consent. *State v. Dalton*, 914 N.W.2d 120, 137 (Wis. 2018); J.A. 59 (Bradley, A.W., dissenting) ("one has a constitutional right, not merely a statutory right, to refuse such a search absent a warrant or an applicable exception"). In *Dalton*, that statement was made in the sentencing context; the court ruled that using a refusal at sentencing violated the right to be afforded an opportunity to refuse. Wisconsin believes that holding was in error.

received consent from an apparent co-tenant. *Id.* (citing *Illinois v. Rodriguez*, 110 S. Ct. 2793 (1990)).

The concept also plays out in cases like *Jardines*, which addressed police walking a drug-sniffing dog onto a porch and up to a home's front door. 569 U.S. at 3–4. There was no explicit consent; rather, police had no discussion at all with the occupant. *See id.* at 3–5; *see also Jardines v. State*, 73 So. 3d 34, 37–38 (Fla. 2011). That posed no problem for the police (the dogs were another question). This Court explained that implicit consent authorized their approach, with nothing more needed. In particular, the defendant impliedly consented to police approaching his front door because of the "customary invitation" of a "knocker on the front door." *Jardines*, 569 U.S. at 8–9 (citation omitted). That did not require police to wait for a homeowner to come outside to approve before walking onto his property and up to his front door. *See Jardines*, 569 U.S. at 3–8.[22]

In the impaired driving context, this Court's statements further support that there is no constitutional right to be afforded an opportunity to

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[22] Mitchell attempts to distinguish Wisconsin's law from consent implied through the "customary invitation" in *Jardines*, but that argument is unavailing. While Mitchell asserts that *Jardines* involved no "fine-grained legal knowledge," Pet'r's Br. 28 n.5 (quoting *Jardines*, 569 U.S. at 8), consent implied by impaired driving is no more subtle than consent implied by door-knocker. There is nothing mysterious about the fact that impaired driving is subject to state regulation. Indeed, this Court has cited *Jardines* in the context of *approving of* impaired driving's implied consent. *Birchfield*, 136 S. Ct. at 2185.

withdraw implied consent. In *Neville*, the Court held that "a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test." 459 U.S at 560 n.10. Unlike *Miranda* warnings, where silence "is one of constitutional dimension," the "right to refuse the blood-alcohol test . . . is simply a matter of grace bestowed by the [state] legislature." *Id.* at 565. Mitchell asserts that *Birchfield* held otherwise, Pet'r's Br. 18, but he offers no language from the opinion so holding.

Other courts have recognized that the Constitution does not require police to offer a driver an opportunity to withdraw his consent. *See, e.g., People v. Hyde*, 393 P.3d 962, 966–69 (Colo. 2017) (upholding Colorado's unconscious person implied consent statute to challenge on Fourth Amendment voluntariness grounds, and explaining that the "police need not wait until a drunk driving suspect returns to consciousness").[23]

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[23] Florida and Ohio appellate courts also have upheld their unconscious person provisions to constitutional challenges post-*Birchfield*. *McGraw*, 245 So. 3d at 769–70; *Speelman*, 102 N.E.3d at 1188.

Mitchell notes some state courts invalidating an unconscious person provision, Pet'r's Br. 44 n.15, but those cases are off point or still pending review. For example, he cites cases turning in part on additional state law requirements (*Arrendondo*, 199 Cal. Rptr. 3d at 570, 574, *review granted and opinion superseded*, 371 P.3d 240 (Cal. 2016); *Commonwealth v. Myers*, 164 A.3d 1162, 1180–81 (Pa. 2018); *Bailey v. State*, 790 S.E.2d 98, 104 (Ga. Ct. App. 2016), *overruled on other grounds by Welbon v. State*, 799 S.E.2d 793 (Ga. 2017)); non-rebuttable presumptions (*State v. Romano*, 800 S.E.2d 644, 652–53 (N.C. 2017); *State v. Dawes*, No. 111310, 2015 WL 5036690 (Kan. Ct. App. Aug. 21,

Beyond being unnecessary, requiring the government to wait until an individual regains consciousness would have the bizarre consequence of favoring drivers who engage in this extremely dangerous behavior. It would reward unconsciousness. Courts rightly have rejected the argument that an unconscious person should have been given time to regain faculties and refuse consent; to do so "would give to the severely intoxicated" "an advantage over the less inebriated." *E.g.*, *Morrow v. State*, 303 A.2d 633, 635 (Del. 1973). That kind of reward is especially inappropriate because the individual, not the government, has created the unconscious condition.

4. The narrow consent inferred is reasonable, especially since the consent flows from the driver's own choices.

"While consent may be an 'independent' ground to justify a search, other indicia of reasonableness have a bearing on [a court's] evaluation of the consent issue." *McGann v. Ne. Ill. Reg'l Commuter R.R. Corp.*, 8 F.3d 1174, 1179 (7th Cir. 1993). "The reason for this is simple: it may be presumed that a person would be less inclined to consent freely to a search having no justification than one that was otherwise well-justified." *Id.* at 1179.

2015) (unpublished)); a concession (*State v. Havatone*, 389 P.3d 1251, 1255 (Ariz. 2017)); or that are still pending review (*State v. Ruiz*, 545 S.W.3d 687 (Tex. App. 2018), *petition granted*; *Arrendondo*, 199 Cal. Rptr. 3d at 570, 574).

Implying consent here is well-justified for three additional reasons: it is narrow; it is narrowed even further by a rebuttable presumption; and the inference sensibly flows from the driver's own choices.

First, Wisconsin's law is narrowly crafted to capture only what is absolutely necessary under the circumstances. It presumes that an unconscious person has not withdrawn his implied consent if—and only if—police have probable cause to believe that he has operated while intoxicated *and* he has rendered himself unconscious without first withdrawing consent. Wis. Stat. § 343.305(3)(b). This simply is not, as Mitchell suggests, inferring consent for "commonplace conduct" such as "walking" or "using a cell phone." Pet'r's Br. 8.

Its aim makes sense. Becoming unconscious is a direct effect of extreme intoxication.[24] The consent continues for one purpose: to gather the only available direct evidence of intoxication. The "less invasive alternative of a breath test" is not available when the driver is unconscious. *Birchfield*, 136 S. Ct. at 2184. The aim also makes sense because the evidence of intoxication dissipates from the bloodstream and, once gone, is lost. For alcohol, its level matters to prosecution and its consequences. *E.g.*, Wis. Stat. §§ 346.63(1)(b), 346.65(2)(g), 343.301(1g)(a)2.b. In

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[24] *Garriott's Medicolegal Aspects of Alcohol*, 430 (Yale H. Caplan & Bruce A. Goldberger, eds., 6th ed.) (2015) (explaining that "impaired consciousness," "sleep or stupor," "complete unconsciousness," "coma," and "possible death" are all clinical signs and symptoms of high levels of alcohol intoxication).

addition, alcohol is far from the only intoxicant of concern, and blood is necessary to test for drugs.

Second, Wisconsin's law is further narrowed because its presumption is rebuttable. The "person who is unconscious or otherwise not capable of withdrawing consent is *presumed* not to have withdrawn consent." Wis. Stat. § 343.305(3)(b).

A person who has lost consciousness due to intoxication may regain consciousness. *See, e.g.*, Robert J. McManus, *Montana v. Egelhoff: Voluntary Intoxication, Morality, and the Constitution*, 46 Am. U. L. Rev. 1245, 1259 n.79 (1997). That person is free to choose to withdraw his consent prior to a blood draw. Or a person who is not yet unconscious may say or do something that evinces that his consent is rescinded—if, for example, Mitchell had said after his preliminary breath test, "I do not agree to you taking my blood," or had a bracelet stating, "no needles."

Mitchell harbors the misconception that the implied consent law provides "categorical" or "irrevocable" consent. *E.g.*, Pet'r's Br. 3, 32. That is not the case. The statute implies consent in very specific circumstances: where there is probable cause that the person has driven while intoxicated. The person may withdraw his consent. Consequences follow from that withdrawal, but only as appropriate under this Court's precedent.

In contrast, several state-court cases Mitchell cites include discussion of state laws that affirmatively *forbid* or *ignore* withdrawal of consent. *See, e.g., State v. Ryce*, 368 P.3d 342, 347 (Kan. 2016); *State v. Halseth*, 339 P.3d 368, 371 (Idaho 2014); *State v. Villarreal*, 475 S.W.3d 784, 800 (Tex. Crim. App. 2014); *Byars v. State*, 336 P.3d 939, 946 (Nev. 2014); *State v. Fierro*, 853 N.W.2d 235, 242 (S.D. 2014). Pet'r's Br. 20–21 n.1. Unlike the laws in those cases, Wisconsin's law does not forbid or ignore withdrawal of consent.

Third, the law's effect reasonably flows from an unconscious driver's own choices. The driver chose to become intoxicated and then drive, creating these circumstances.

Mitchell often resorts to slippery slope rhetoric, asserting that, under an implied consent theory, States could conduct broad searches of private property following public announcements. Pet'r's Br. 31–32. Mitchell similarly asserts that the unconscious person presumption is unduly broad because it "legislate[s] consent" for those who "cannot make any choice" and because it concerns the "mundane act of driving." Pet'r's Br. 22, 26–27.

Mitchell's views disregard that an individual's choices and actions are the foundation for the consent in the first place. He notes that most Wisconsinites drive to work, suggesting that their privacy interests have been compromised. Pet'r's Br. 26-27. But he miscalculates the value of consent for most drivers.

The vast majority will never have their blood drawn because probable cause of intoxicated driving will never arise. Rather, implied consent protects those who do not drive while impaired but who are at risk, every day, of being injured or killed by those who do. In 2015, an average of one Wisconsinite was killed or injured every 2.9 hours.[25]

More generally, making choices affecting future consent is an accepted concept—for example, it is a concept in healthcare decision-making. Advance healthcare directives recognize that individuals may consent in advance to certain care, and they recognize the continuing validity of such choices if the person cannot make decisions in the future. The Patient Self Determination Act requires healthcare providers to inform patients of their right to accept or refuse medical treatment, *and* of their right to execute an advance directive: choices are made now for when the person later cannot make them due to being "incapacitated." *See* 42 U.S.C. §§ 1395cc(f)(3), 1396a(w)(4); *Winfield v. Mercy Hosp. & Med. Ctr.*, 591 F. App'x 518, 519 (7th Cir. 2015).[26]

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[25] *Drunk driving crashes, fatalities and injuries*, State of Wis. Dep't of Transp., https://wisconsindot.gov/Pages/safety/education/drunk-drv/ddcrash.aspx (last visited Mar. 25, 2019).

[26] As with implied consent impaired driving laws, all 50 States have statutes recognizing the use of advanced healthcare directives. David Y. Nakashima, *Your Body, Your Choice: How Mandatory Advance Health-Care Directives are Necessary to Protect Your Fundamental Right to Accept or Refuse Medical Treatment*, 27 Harv. L. Rev. 201, 207–09 (2004).

Mitchell himself recognizes this concept. He looks to *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), to explain the problem of discerning the healthcare decision that an incompetent person would make. Pet'r's Br. 23. But he forgets that *Cruzan* saw no problem where the person already had indicated the healthcare he would consent to or refuse. *Cruzan*, 497 U.S. at 284–85. That is the concept in play here, where an unconscious (or otherwise severely intoxicated) driver has consented beforehand to a very limited physical intrusion in the event of probable cause.[27]

If the broad consent-by-choice is acceptable for invasive and fundamental medical care, it should not offend the law to infer a much narrower type of consent to a blood draw for evidentiary reasons.

Having made the choice to drink and drive—to the point of losing consciousness through intoxication or becoming involved in a crash—the impaired driver should reasonably know he may be poked by a needle. An unconscious person suspected of intoxication is likely to have his blood drawn by hospital staff for medical reasons apart from law enforcement's need for evidence. Medical staff will need to determine the nature and extent of intoxication to treat the person. Standard medical care for treatment of an acute unresponsive patient includes that "urine and blood

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[27] Mitchell asserts that a person cannot consent when unconscious. Pet'r's Br. 23 (citing *Schneckloth*, 412 U.S. at 224). However, he ignores that, under the implied consent law, the person already has consented.

drug screens should be obtained if any toxicity is suspected." S. Arthur Moore & Eelco F. Wijdicks, *The Acutely Comatose Patient: Clinical Approach and Diagnosis*, 33 Seminars in Neurology 110, 116 (2013). Likewise, a "quick, effective direct laboratory-based test for alcohol" is necessary to "assess the severity of effects from alcohol intoxication" for emergency room patients, many of whom are unconscious; "[i]t is recognized that direct blood or serum measurement provides the best all-around test for alcohols." Garriott's, *supra* note 24, at 437, 443.

The unconscious intoxicated driver has chosen to expose himself to the same procedure medically as the police seek to do for public safety. That overlap further supports inferring consent.

* * * *

Consent should not end where, as here, the blood draw is made necessary by the intoxicated driver's own choices. Rather, the Court should continue its tradition of recognizing the validity and utility of the States' implied consent laws. Mitchell's implied consent continued, as it was not withdrawn, and justified the blood draw in this case.

B. The search was reasonably imposed as a condition of driving on public roads to combat the intoxicated operation of motor vehicles.

As stated above, Mitchell's blood draw was valid under the Fourth Amendment because he consented.

Alternatively, this Court could hold that Mitchell's blood draw was a reasonable condition imposed on the privilege of driving to combat intoxicated operation of motor vehicles. The Court has reaffirmed that "[t]he touchstone of the Fourth Amendment is reasonableness." *Jimeno*, 500 U.S. at 250 (citation omitted).

Where it is reasonable, this Court has recognized that a public benefit or privilege may be conditioned on compliance with a search. Mitchell agrees that a balancing test would apply to the question posed here, in that it concerns "evaluating the reasonableness of searches imposed as a condition of accepting certain government benefits." Pet'r's Br. 37. That test states: "whether a particular search meets the reasonableness standard 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53 (1995).

For example, the Court authorized random urinalysis drug testing of students as a reasonable condition for those seeking to participate in school athletics programs. *Vernonia Sch. Dist. 47J*, 515 U.S. at 648. Applying the balancing test, it held that the policy was "reasonable and hence constitutional." *Id.* at 665. The Court has applied balancing to uphold warrantless drug testing of Customs Service employees who seek to be promoted to positions that directly involve the interdiction of illegal drugs or that require the incumbent to carry a firearm.

Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 677 (1989). Yet another example of this balancing is found in *Maryland v. King*, 569 U.S. 435, 448 (2013), where the Court applied the test to conclude that taking DNA samples as part of a booking procedure was reasonable under the Fourth Amendment. And the Court has applied the test in the driving context: in *Sitz*, the reasonableness test was applied to sobriety checkpoints. The Court upheld them because the trade-offs "weigh[ed] in favor of the state program." *Sitz*, 496 U.S. at 455 (citation omitted).[28]

The justification is more likely to be present in special, highly-regulated spheres. *Barlow's*, which *Birchfield* cited in the context of consent, also provides guidance in this context. The Court explained that, while there were limits to warrantless inspections, those limits did not apply to areas with a special "history of government oversight" that naturally come with heightened governmental regulation. 436 U.S. at 313. Such heavily-regulated activities include the liquor industry, and *Barlow's* endorsed those warrantless searches. *Id.* (citing *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (warrantless searches in liquor industry); *United States v. Biswell*, 406 U.S. 311 (1972) (warrantless searches in the firearms industry)).

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[28] There are many other examples of the balancing test in Fourth Amendment jurisprudence. *E.g.*, *Samson v. California*, 547 U.S. 843, 848, 857 (2006) (applying the test to uphold a police officer's suspicionless search of a parolee).

In realms like liquor, the Court observed that, "when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." *Id.* [29] In other words, he has agreed to a limited type of search, which is reasonable given the context and stakes (heavily-regulated intoxicating liquors) and the benefits received (operating in that market).

Of course, intoxicants are not *less* regulated when used on the road. Just the opposite is true. Their use interacts with a second highly-regulated sphere, driving, where everyone knows that the stakes are higher.

"[D]riving on public highways is a privilege." *Winsley v. Cook Cty.*, 563 F.3d 598, 604 (7th Cir. 2009). It is one "subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements." *S. Dakota v. Opperman*, 428 U.S. 364, 368 (1976). That is unsurprising. As this Court has long recognized, "[m]otor vehicles are dangerous machines" and "the state may make and enforce regulations reasonab[ly] calculated to promote care on the part of all, residents and nonresidents alike,

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[29] Mitchell asserts that the closely-regulated-industry cases do not go as far as the State needs the Court to go here, but that is incorrect. Pet'r's Br. 35 n.11. The statutes in those cases provided penalties for refusal, as opposed to allowing inspection "regardless of lack of consent," as Mitchell puts it. Rather than contrast with Wisconsin's implied consent law, that tracks it: if a person withdraws implied consent, police may not proceed based on his consent; rather, a penalty applies.

who use its highways." *Hess v. Pawloski*, 274 U.S. 352, 356 (1927).

Put differently, driving safely is part of a social compact that, when broken, imposes significant costs on others: "the externality imposed on society by drunk driving may be as high as $8,000 for each incident of drunk driving." Miguel F. P. de Figueiredo, *Throw Away the Key or Throw Away the Jail? The Effect of Punishment on Recidivism and Social Cost*, 47 Ariz. St. L.J. 1017, 1043 (2015). Even in 2002 dollars, that was estimated to be "approximately fifty-one billion dollars per year, *excluding* deaths and injuries." *Id.* (emphasis added). It is no wonder that driving, especially impaired driving, is uniquely regulated.

Implied consent impaired driving laws are a special case among special cases, targeting where driving and intoxicants overlap. And the unconscious driver provision is even narrower. To combat intoxicated driving, it is reasonable to condition driving on an officer's ability to direct the taking of a blood draw in the circumstances here.

1. Wisconsin has a compelling interest in obtaining blood evidence from unconscious persons who operated while intoxicated.

One side of the balance looks to the gravity of the government interest. The State's interest here should weigh heavily. Effective enforcement of impaired driving laws is required if the laws are to serve their

key "deterrent" function and also are to "remove[ ] [impaired] drivers from the road." *Mackey v. Montrym*, 443 U.S. 1, 18 (1979).

"No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *Sitz*, 496 U.S. at 451. Thus, in *Sitz*, this Court held that Michigan's sobriety checkpoints—under which passing cars were stopped and drivers examined for signs of intoxication—were reasonable under the Fourth Amendment in large part due to the dangers posed by intoxicated driving.

The statistics show how serious the danger is: in a given year, it takes 10,000 lives or more. *See supra* note 3. Operating while intoxicated causes far more deaths than terrorist attacks of airplanes, but even the limited threat of the latter supports the reasonableness of TSA airport checkpoints. *See, e.g., United States v. Hartwell*, 436 F.3d 174, 179 (3rd Cir. 2006).

Further, drug-impaired driving is on the rise. An opioid epidemic spans the country. Other drugs, like marijuana, add to the dangers. The number of fatally-injured drivers who tested positive for drugs is dramatically on the rise: it rose from 27.8% to 43.6% in the ten years between 2006 and 2016, with drivers testing positive for substances like marijuana, opioids, or both. Put plainly, "[d]runk driving has taken a heavy toll in Wisconsin. Now, drugged driving is gaining a foothold." *See supra* notes 6–8, 13.

Mitchell challenges the subsection applicable to especially dangerous offenders: drivers who are drunk or drugged *and* unconscious. The dangers, and the government interest in public safety, is even more compelling than usual.

Wisconsin is unaware of statistics about impaired drivers that are unconscious when stopped by police, but the problem is very real. It is documented that drunk drivers lose consciousness and, unsurprisingly, those drivers may leave "a path of destruction in [their] wake." Indeed, the drivers being cited for drunk driving are *very* intoxicated. In Wisconsin, for example, the *median* blood alcohol concentration was 0.16%, which is the threshold for "severe impairment." Unsurprisingly, a potential result of being severely impaired is unconsciousness. *See supra* notes 9–11.

An overdose on opioids also causes unconsciousness. Media reports reflect that, unfortunately, driving and overdosing mix on the road. It is not difficult to find this sort of headline: "Unconscious man drives through neighborhood lawns after using heroin"; "Unconscious driver on I-43 overdosed on heroin"; and so on. *See supra* notes 12–14.

In turn, the States' laws need to be enforced effectively both to deter impaired driving and to remove dangerous drivers from the road. And a key part of enforcing the laws effectively is knowing the *level* of intoxication. It is required for prosecuting the

crime of operating a motor vehicle with a prohibited alcohol concentration. Wis. Stat. § 346.63(1)(b). In addition, the severity of the consequences for *any* impaired driving offense depends on the particular level of alcohol concentration. Wis. Stat. § 346.65(2)(g) (pegging fines to levels of intoxication of 0.17, 0.20, or 0.25%). Further, a first-time offender who violates the law with an alcohol concentration of 0.15% or higher is required to have an ignition interlock device installed. Wis. Stat. § 343.301(1g)(a)2.b. And, for restricted controlled substances, a prosecution also requires a blood test to detect their presence. Wis. Stat. § 346.63(1)(am).

The justification for the law is compelling. Those covered are, by any reasonable estimate, among the most dangerous people on the road.

2. The unconscious driver presumption is narrowly tailored and minimally intrusive, especially under the circumstances.

The other side of the balance looks to the intrusion on the individual. Here, it is slight. The unconscious driver provision helps obtain necessary evidence in a narrow situation: it establishes a presumption of non-withdrawal of consent that enables police to obtain the only available direct evidence. It is taken from a person who has engaged in a dangerous version of already dangerous behavior, through the least intrusive available means.

Contrast Wisconsin's narrowly tailored provision to the license-and-registration checkpoint system this Court deemed unreasonable in *Delaware v. Prouse*, 440 U.S. 648, 657, 663 (1979). The Court balanced the "public interest against the individual's Fourth Amendment interests," and concluded that, while states have a vital interest in ensuring that "only those qualified to do so are permitted to operate motor vehicles," "discretionary spot check[s]" without probable cause were not a "sufficiently productive mechanism to justify the intrusion." *Id.* at 657–61.

The narrow scope here contrasts starkly. The unconscious driver presumption applies only where police have probable cause to believe the person operated while intoxicated, only where the person is unconscious or otherwise incapable of withdrawing consent, and only where the person has not previously withdrawn consent.

When it does apply, it adds very little intrusion. A person who drives on public roads and becomes unconscious will need physical assistance from other people, including medical care. Medical personnel likely will draw blood no matter what. Allowing the police also to administer a blood draw adds no novel physical intrusion to what should be reasonably expected.

Indeed, an impaired unconscious driver who requires aid from others is merely being asked to uphold his end of the bargain. Society will provide him with emergency aid but makes a modest demand

to detect his level of intoxication. *See* Donald J. Kochan, *Bubbles (or, Some Reflections on the Basic Laws of Human Relations)*, 26 Fordham Envtl. L. Rev. 133, 161 (2015) (discussing society's "reciprocal relationships").

Not only is the additional intrusion slight, but the unconscious intoxicated driver feels none of it. This factor, too, favors the search's reasonableness.

3. In addition, the blood draw was reasonable because Mitchell's proposed alternative — a warrant — imposes significant burdens while adding nothing meaningful for the suspect.

Mitchell proposes that police should always obtain a warrant absent an exigency. But determining whether an exigency exists requires guesswork; and obtaining a warrant takes time. This Court should reject Mitchell's proposal. It would provide no real benefit to a suspect and would distract police when they need to concentrate most.

Warrants protect privacy in two main ways: (1) they ensure a search is not carried out unless a magistrate determines police have probable cause that evidence will be found, and (2) they delineate the scope of the search. *Birchfield*, 136 S. Ct. at 2181.

This Court observed in *Birchfield* that neither privacy interest would be served by requiring warrants for every test of intoxicated driving. A

magistrate would typically review the "same facts that led the officer to find there was probable cause," written by that officer; a magistrate would be in a "poor position to challenge such characterizations." *Id.* at 2181. And requiring warrants would not help delineate a search's scope "at all"—in every case, the "scope of the warrant would simply be a BAC test." *Id.*

The same holds true for blood draws for unconscious intoxicated motorists.

First, once discerned, probable cause will not be subject to serious doubt. For example, courts have recognized the "wealth of probable cause" stemming from driving while intoxicated, when the driver was nonresponsive and smelled strongly of alcohol. *E.g.*, *State v. Speelman*, 102 N.E.3d at 1189. No magistrate would be in a position to seriously question that.

Offering no factual support, Mitchell supposes that police need more confirmation of probable cause for unconscious than conscious drivers, on the theory that unconscious people cannot perform sobriety tests like walking in a straight line. Pet'r's Br. 44–45. That supposition defies common sense. A driver so intoxicated that he has become unconscious will have the strong indicia of impaired driving: odor, inability to respond (often while in the driver's seat), and evidence of dangerous driving prior to passing out or being involved in a crash. Mitchell himself illustrates that fact. Before he fell unconscious, he was so intoxicated that he needed support to stand, and

officers immediately realized he could not perform sobriety tests. A magistrate would have added nothing to that observation.

Second, the scope of the blood draw always will be the same: simply obtaining blood to test for intoxication. The actual conduct of the search will thus be precisely the same regardless whether obtained via a warrant.

Not only would the warrant serve no demonstrable purpose, but requiring that step would pose risks. Police likely will need time to assess the unconscious driver's state and any injuries to others, and to secure the scene caused by the unconscious driving's "path of destruction." Perhaps that would rise to an exigency, but an officer should not have to guess. Police should be reacting to the scene. Mitchell asserts that obtaining warrants is "routinized," Pet'r's Br. 43, but what he misses is that the unconscious driver situation poses special concerns. It is not, in the sense Mitchell proposes, routine.

That is especially true because medical attention is more likely to be needed for an unconscious person. Even a small amount of time spent on something other than aiding a person could be the difference between life and death. For example, a study in Massachusetts between 2014 and 2016 revealed that 36% of the fentanyl overdose deaths showed evidence of the overdose starting "within seconds to minutes after drug use, and 90% of fentanyl overdose

decedents were pulseless" when emergency medical services arrived.[30]

* * * *

Special circumstances will arise where a privilege or benefit may be conditioned on a properly tailored search. This is one of them. It addresses the intersection of two highly-regulated and risky things: intoxicants and driving. In light of the stakes, the condition imposed is modest: the driving privilege is conditioned on a search for intoxicants if the driver is unconscious and intoxicated. That is reasonable under this Court's Fourth Amendment balancing test.

III. Alternatively, drawing blood from an unconscious impaired driver is reasonable under *Birchfield* as a search incident to arrest.

In *Birchfield*, the facts presented required this Court to resolve whether a blood draw of a conscious person was permissible as a search incident to arrest. The Court said it was not because of the "availability of the less invasive alternative of a breath test." 136 S. Ct. at 2184.

Birchfield did not present the unconscious person scenario that arises here, and so it contains no controlling holding on that point. Rather, this Court

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[30] Nicolas J. Somerville et al., *Characteristics of Fentanyl Overdose — Massachusetts, 2014–2016*, 66 Morbidity & Mortality Wkly. Rep., 382 (2017), https://www.cdc.gov/mmwr/volumes/66/wr/ mm6614a2.htm.

just commented that, for the unconscious, it had "no reason to believe that such situations are common" and that, "when they arise, the police may apply for a warrant if need be." *Id.* at 2184–85.

Now that the issue truly is at hand, the Court should not follow that dicta. The key reasons that this Court gave for distinguishing a breath test from a blood test for the *conscious* driver would not apply here.

First, this Court's distinction hinged on the "availability of the less invasive alternative of a breath test." *Birchfield*, 136 S. Ct. at 2184. Everyone agrees that alternative is unavailable for an unconscious motorist.

Second, this Court's comment about a warrant relied on an assumption that unconscious driver situations are uncommon. The instances that the State and its amici are aware of, however, suggest that unconscious intoxicated driving occurs far too often. When it occurs, the stakes are high, especially since communities now are struggling with opioid-caused unconscious driving.

Third, the Court's observation that, when people are awake, a blood draw process "is not one they relish" would not apply to the unconscious driver. *Birchfield*, 136 S. Ct. at 2178. An unconscious person will not experience the piercing of his skin in the same way as a conscious person—he will not sense it. And, importantly, the unconscious driver may be subject

to medical procedures, no matter what, since professionals likely will need to take his blood or perform other tests.

There thus is good reason to revisit *Birchfield*'s comment about the unconscious. If this Court were to do so, a balancing test like that discussed above would apply. This Court would balance the "degree to which [blood draws] intrude upon an individual's privacy and . . . the degree to which they are needed for the promotion of legitimate governmental interests." *Id.* at 2176 (citation omitted). As discussed, that kind of inquiry would find a compelling government interest, narrowly tailored, and only a slight increase in intrusiveness, if any.

* * * *

The unconscious intoxicated driver scenario is not as uncommon as one would hope. When it arises, police should be able to act decisively within the narrow confines of the implied consent presumption. That mechanism provides consent that satisfies the Fourth Amendment. Regardless, it is reasonable to search under these circumstances based on the Fourth Amendment's balancing test. Either way reasonableness—present here—should dictate the result.[31]

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[31] Wisconsin did not violate Mitchell's constitutional protections for the reasons stated here. If this Court were to hold otherwise, it should remand to the state court to determine whether the evidence must be suppressed. *Birchfield*, 136 S. Ct. at 2186, n.9 (citing *Heien v. North Carolina*, 135 S. Ct. 530

CONCLUSION

The judgment of the Wisconsin Supreme Court should be affirmed.

Dated this 27th day of March, 2019.

Respectfully submitted,

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No. 18-6210

IN THE

Supreme Court of the United States

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Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

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INTRODUCTION

The State takes the extraordinary position that the Fourth Amendment permits it to exempt particular searches from the warrant requirement simply by enacting a statute to that effect. Wisconsin Statute § 343.305 purports to deem the millions of individuals who drive in Wisconsin to have given valid constitutional consent to a warrantless blood draw, such that the State need not seek a warrant, or establish actual consent, before drawing the blood of an unconscious motorist suspected of drunk driving. This breathtaking assertion of authority to sidestep the Fourth Amendment's warrant requirement has no evident limiting principle. The State certainly has not supplied one: it has not suggested any principled reason that a State could not enact a statute providing that other everyday conduct — walking down public streets at certain times of day and in particular neighborhoods, for instance, or using a cell phone — constitutes consent to a search or seizure.

Nor does the State offer any persuasive justification for treating warrantless blood tests on unconscious individuals as a reasonable condition of driving. This Court has already held that a blood draw is a significant bodily intrusion that implicates substantial individual privacy interests. *Missouri* v. *McNeely*, 569 U.S. 141, 148 (2013) (plurality); *id.* at 174 (Roberts, C.J., joined by Alito and Breyer, JJ., concurring); *Birchfield* v. *North Dakota*, 136 S. Ct. 2160, 2178 (2016). The Court has also held that the need to obtain a warrant, absent exigent circumstances, does not hinder law-enforcement interests to investigate and prevent intoxicated driving. The State identifies no law-enforcement interest requiring a different result

here. The State's position cannot be reconciled with this Court's Fourth Amendment jurisprudence and should be rejected.

ARGUMENT

I. Petitioner's blood draw cannot be justified on the basis of "consent" imputed by a state statute.

A. The State may not dispense with the voluntary-consent analysis by deeming consent to be present.

1. The State argues that petitioner consented to an unconscious blood draw, such that the Fourth Amendment permitted officers to draw his blood without a warrant. The State has not attempted to show (nor could it) that petitioner in fact voluntarily consented to the blood draw. Instead, the State relies solely on Section 343.305, which purports to render a single circumstance — the act of driving in the state — conclusive evidence of consent. Br. 24. The State further argues that individuals need not even be aware that by driving, they are consenting to a warrantless blood draw. *Id.* at 30. Citizens' lack of actual awareness is no concern, the State asserts, because they are legally presumed to know the law.[1] *Id.* at 30–31. The State thus piles presumption upon presumption: every motorist within its borders is presumed to know about the implied-consent statute; their consent to its terms is

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[1] The State has not attempted to show that motorists are in fact aware of the implied-consent statute. And it has abandoned the Wisconsin Supreme Court plurality's unsupported assertion that the statute's provisions are "well-publicized." J.A. 19, 28.

presumed from their decision to drive; and, if they become unconscious, they are presumed not to have withdrawn consent. That novel and troubling position cannot be reconciled with this Court's well-established voluntary-consent precedents.

By imputing consent by operation of law, the State purports to relieve itself of its burden to establish the existence of voluntary consent under "the totality of all the circumstances." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222–223 (1973); *Florida* v. *Bostick*, 501 U.S. 429, 439 (1991). And by providing that the mere act of driving constitutes consent to an unconscious blood draw, the State has deemed dispositive a fact that will necessarily be present in all cases. See *Bostick*, 501 U.S. at 439 (lower court erred by applying per se rule to consent analysis making a "single factor * * * dispositive in every case"). Section 343.305 thus purports to create a per se exception to the warrant requirement in the case of unconscious motorists. But state law cannot control the scope of the Fourth Amendment's warrant requirement.

2. The State attempts to analogize the operation of its statute to situations where courts have held that consent may be inferred from conduct. See Br. 25–27. These arguments are meritless.

First, the State relies on a smattering of circuit-court cases stating that consent to search could be inferred from individuals' actions under the circumstances. To the extent that those decisions relied on voluntary consent to justify the searches at issue,[2]

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[2] Although these cases refer to "implied consent," they also analyze the searches under the reasonable conditions framework. See *Ellis*, 547 F.2d at 866 (military authorities could reasonably

however, they applied the traditional totality-of-the-circumstances analysis. See *United States* v. *Ellis*, 547 F.2d 863, 866 (5th Cir. 1977) (civilian visiting naval base consented to search of vehicle where he read terms of visitor pass stating that acceptance of pass constituted consent to search and displayed pass on his windshield); *Morgan* v. *United States*, 323 F.3d 776, 781–782 (9th Cir. 2003) ("a person may impliedly consent to a search on a military base" but "'[c]onsent is implied by the totality of all the circumstances'") (citation omitted); *McGann* v. *Northeast Illinois Reg'l Commuter R.R.*, 8 F.3d 1174, 1180–1181 (7th Cir. 1993) (sign warning that vehicles are "subject to search" was relevant to consent, but "courts have not accepted [defendant's] notion of implied consent characterized simply by notice and voluntary conduct").[3]

These decisions did not impute consent by operation of law. They did not look only to a single circumstance deemed by state statute to be the sole dispositive factor. Instead, they examined the circumstances that actually attended the search and considered whether the defendant's consent could be fairly inferred as a matter of fact.

Second, the State suggests that this Court's discussion of inferred consent in *Florida* v. *Jardines*, 569 U.S. 1 (2013), supports its position. Br. 26, 35. To the

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"condition[]" defendant's "entry and stay on the military reservation upon his consent to the search of his vehicle"); *Morgan*, 323 F.3d at 778 (referring to "search as a condition to entry"); *McGann*, 8 F.3d at 1181 (noting that "the doctrine of implied consent really has little to do with 'consent'" as that term is generally understood" (citation omitted)).

[3] The State's remaining court of appeals cases stand for the unremarkable proposition that consent may be expressed by gestures or actions rather than words. Br. 25 n.16.

contrary, *Jardines* demonstrates the limits of inferring consent from conduct. *Jardines* held that the presence of a knocker on the front door of a residence grants an implicit license to approach the home to knock on the door — but *not* to conduct a canine sniff search. *Id.* at 8–9. *Jardines*' holding was based on "background social norms" that inform the inferences that may reasonably be drawn from conduct. *Id.* at 9. Those norms make it reasonable to infer that a homeowner's installation of a knocker at the front door represents an invitation to approach and knock. *Id.* at 8–9. But because there is no norm permitting a visitor to conduct a search at the homeowner's doorstep, no consent to such a search could be inferred. *Ibid.*

Here, the State does not ask this Court to draw inferences from factual circumstances based on widely accepted social norms. The State does not contend that there is any "background social norm[]" of submitting to warrantless blood draws when suspected of drunk driving. *Jardines*, 569 U.S. at 9. Indeed, a significant proportion of drivers in fact refuse a blood test when they have the opportunity to do so. Pet. Br. 29. Thus, the State's argument relies not on factual inferences but rather on a series of legal presumptions. Accordingly, the principle that consent may be inferred from conduct is not applicable here.

3. The State next attacks two strawmen, addressing arguments petitioner does not press.

The State contends that petitioner asserts the right to an opportunity to withdraw consent previously given. Br. 33–37. That misunderstands petitioner's argument. Petitioner asserts that, because the implied-consent statute cannot establish valid consent to

a warrantless blood draw based solely on the motorist's decision to drive, valid consent, if any, must occur at the scene when the officer requests a blood sample. Because an unconscious motorist cannot give valid consent, the State cannot rely on the consent exception to conduct a warrantless blood draw on such a person. Contrary to the State's contention, this does not "reward" motorists who become unconscious or "enhance[]" their Fourth-Amendment rights. Br. 33–34, 37. It merely recognizes that unconscious persons are incapable of giving the actual, voluntary consent required for the consent exception to apply.[4]

The State also suggests that petitioner seeks to impose a requirement of a knowing and intelligent waiver of the kind rejected in *Schneckloth*. Br. 31. Petitioner does not question *Schneckloth*'s holding that, for consent to be voluntary, individuals need not be informed of their right to refuse a search. 412 U.S. at 232–233. But for consent to mean anything, individuals must, at a minimum, be aware *that they are consenting to something*. The State's position that an individual may be deemed to consent to the terms of a statute without even knowing of that statute's existence demonstrates just how far removed its argument is from ordinary consent analysis.

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[4] Nor is petitioner suggesting that police officers must wait for an individual to regain consciousness and give consent. Br. 37. The State may obtain a warrant permitting it to draw blood while the individual is unconscious, or it may proceed without a warrant if exigent circumstances exist.

B. The State may not rely on *Birchfield* to support its application of its implied-consent statute.

The State next argues that this Court expressed approval of implied-consent statutes, as a general matter, in *Birchfield*, 136 S. Ct. 2160. See Br. 22. True enough. But *Birchfield* did not hold that a State may supply constitutionally valid consent to a search by enacting such a statute. Had it done so, *Birchfield* would not have invalidated the criminal penalties imposed by North Dakota for refusing to submit to blood testing. If implied-consent statutes establish valid consent to a warrantless blood draw, then there can be no constitutional obstacle to the State's imposition of criminal penalties for refusing to submit — just as there is no constitutional bar on criminal penalties for refusing to submit to warrantless breath tests. *Birchfield*, 136 S. Ct. at 2186.

Rather, at issue in *Birchfield* was the validity of the condition imposed by the State in exchange for the privilege of driving — *i.e.*, submission to a warrantless blood draw on pain of criminal penalties. The Court described the condition as one that "deemed" individuals "to have consented" to those "consequences," and it applied the reasonableness framework that governs the validity of conditions that are imposed regardless of actual consent. 136 S. Ct. at 2185. Under this framework, the validity of a search condition turns on the reasonableness of the condition based on the balancing of public and private interests. Thus, *Birchfield* establishes that the appropriate inquiry is the reasonableness of the search condition, not the consent of the motorist to the search. And, for the reasons described in petitioner's opening brief, Pet. Br. 36–46,

and *infra*, pp. 9–21, submission to a warrantless unconscious blood draw is not a reasonable condition on the privilege of driving.

C. The State's remaining arguments in support of its imputed-consent regime lack merit.

The State makes various arguments regarding the purported reasonableness of the searches authorized by its implied-consent statute. See Br. 37–43. Those arguments are not relevant to the question of consent, which depends on the motorist's actual, voluntary consent to the search, not on the search's reasonableness. *Schneckloth*, 412 U.S. at 224–226. In any event, the State's justifications for the reasonableness of the search are meritless.

The State contends that its unconscious blood-draw provision is reasonable because it is tailored to situations in which the defendant is unconscious. Br. 38–39. But it makes no sense to impute consent only where the defendant, by definition, lacks capacity to consent. The State also makes various arguments to the effect that it has a heightened interest in obtaining BAC evidence from unconscious motorists, but offers no reason why these interests could not be equally served by conducting a blood draw pursuant to a warrant.

The State further posits that presuming that an unconscious person has not withdrawn consent is reasonable because the presumption is rebuttable. Br. 39–40. But the possibility that an unconscious person could regain consciousness and withdraw consent has no bearing on the validity of the consent of those who remain unconscious. And it strains credulity to believe

that people would wear a bracelet saying "no needles." *Id.* at 39.

Finally, the State asserts that the consent to the blood draw flows from the unconscious motorist's own choices. Br. 40–43. However, the choices at issue concern not the motorist's consent to the search, but rather his suspected criminal conduct itself. The notion that a defendant consents to a search by engaging in conduct that gives rise to probable cause has no basis in this Court's precedents. In many cases where the State wishes to conduct a search, the probable cause will arise from the defendant's own actions. Under the State's rationale, it would be reasonable to enact statutes dispensing with the warrant requirement in all such cases.

In sum, the State's assertion that it may impute consent to all drivers on its roads cannot be squared with this Court's consent jurisprudence and has troubling implications extending well beyond the drunk-driving context. This Court should reject it.

II. The Fourth Amendment does not permit the State to impose an unconscious blood draw as a condition of driving.

Just as the State may not justify petitioner's blood draw on the basis of consent, it may not justify it as a reasonable condition imposed on driving in the State. As *Birchfield* held, the Fourth Amendment imposes a "limit" on such conditions: they must be reasonable under the Fourth Amendment, in that the intrusion on privacy must be outweighed by the legitimate government interests in the search. 136 S. Ct. at 2185. *McNeely* and *Birchfield* establish that the intrusion on privacy occasioned by a blood draw is significant, and

that the law enforcement interests in drawing blood without a warrant are slight. Officers will ordinarily be able to obtain a warrant in the time it takes to arrange for a blood draw, and the exigent-circumstances exception will protect their ability to proceed without a warrant when time is of the essence. There is no reason to reach a different conclusion in the context of unconscious drivers. The State's arguments to the contrary are meritless.

A. An unconscious motorist has a substantial privacy interest in avoiding the significant bodily intrusion of a blood draw.

This Court has already held that a blood draw is a significant bodily intrusion that "'require[s] piercing the skin' and extract[ing] a part of the subject's body." *Birchfield*, 136 S. Ct. at 2178 (citation omitted); accord *McNeely*, 569 U.S. at 148. An individual's unconsciousness only worsens the intrusion, because the individual cannot object. The State has three responses, all meritless.

First, the State attempts to minimize the intrusion on the ground that an unconscious person "feels none of it." Br. 52. But that is no answer to this Court's repeated statements that, even though a blood test "typically involves virtually no risk, trauma, or pain," "any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests." *McNeely*, 569 U.S. at 159 (citation omitted); accord *id.* at 174 (Roberts, C.J., joined by Alito and Breyer, JJ., concurring) (describing a forced blood draw as a "significant bodily intrusion[]"); *Birchfield*, 136 S. Ct. at 2183. A person's interest in preventing

the government from piercing his skin to obtain evidence is a *privacy* interest against bodily invasion that does not depend on the extent to which the individual contemporaneously feels pain as a result. Cf. *Winston* v. *Lee*, 470 U.S. 753, 765 (1985) (surgery under general anesthesia at the behest of law enforcement "involves a virtually total divestment of respondent's ordinary control over surgical probing beneath his skin"). Indeed, the sense of having been powerless to advocate for oneself during a bodily intrusion undertaken for law enforcement purposes is in itself a substantial intrusion on one's sense of dignity and autonomy.[5]

Second, the State points out that an unconscious motorist may sometimes receive emergency medical care, and that "[m]edical personnel will likely draw blood no matter what." Br. 42–43, 51. The thrust of this argument seems to be that the governmental taking of blood involves little incremental invasion of privacy. But the purpose of the intrusion matters — the State's "'piercing the skin' and extract[ing] a part of the subject's body," *Birchfield*, 136 S. Ct. at 2178 (citation omitted), for the purpose of gathering evidence that may be used against the individual in a criminal proceeding is a far greater violation of personal dignity and autonomy than a medical provider doing the same for the purpose of rendering care. Even where a medical procedure is performed without informed consent because of emergent circumstances such as unconsciousness, it is

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[5] In addition, Wisconsin's statute applies not only to unconscious motorists, but also to any "person who is * * * otherwise not capable of withdrawing consent." Wis. Stat. § 343.305(3)(b). That would include motorists who are incoherent or incapable of communicating due to, for instance, a stroke or other medical condition, but who are still capable of experiencing the process.

understood that the medical provider is acting in the interests of the patient, such that the patient ordinarily would consent if given the opportunity.[6] See *Winston*, 470 U.S. at 765; see also *Birchfield*, 136 S. Ct. at 2178 (acknowledging that people often "voluntarily submit to the taking of blood samples as part of a physical examination," but nonetheless reaffirming that a "'compelled'" blood test is a significant intrusion) (citation omitted). As a result, a blood draw performed to facilitate medical care does not vitiate a driver's privacy interest against the qualitatively different, and more severe, intrusion presented by a blood draw for law enforcement purposes.[7]

Finally, the State argues that the fact that not many people will be subject to a warrantless unconscious blood draw renders the intrusion "narrow" in scope. Br. 51. But this Court has not evaluated the severity of a bodily intrusion based on how many people might be subject to it. Thus, in *Winston*, the court stated that in "analyzing the magnitude of the intrusion," the relevant factors are the intrusion upon the individual's dignitary interest in bodily integrity, as well as the degree of pain and risk, if any. 470 U.S. at 761–762.

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[6] Accordingly, statutes such as the Health Insurance Portability and Accountability Act of (HIPAA) 1996, Pub. L. No. 104-191, 110 Stat. 1936, reflect the understanding that receiving medical care does not vitiate an individual's privacy interests in avoiding having medical information used for other purposes, including law-enforcement purposes. See, *e.g.*, 45 C.F.R. § 164.512(f)(1)(ii) (HIPAA regulations providing that medical personnel generally may disclose results of a blood test to law enforcement only pursuant to a warrant or other court order or legal requirement).

[7] For the same reasons, absent actual consent, the motorist cannot be said to have entered a "bargain" by which he or she agrees to a blood draw in exchange for "society's" provision of potentially life-saving treatment. Br. 51–52.

The Court did not consider the fact that few individuals were likely to be subject to compelled surgery to retrieve evidence of a crime.

B. The law enforcement interest in proceeding without a warrant is slight.

The State implicitly concedes that its interest in drawing blood from unconscious motorist without a warrant is minimal at best. The State does not argue that seeking a warrant before drawing blood from an unconscious driver would impair its ability to enforce its drunk-driving laws. Br. 47–50. And the State does not dispute that — as this Court has repeatedly recognized — obtaining a warrant ordinarily causes no material delay in securing a blood sample. *McNeely*, 569 U.S. at 154; *id.* at 172 (Roberts, C.J., joined by Alito and Breyer, JJ., concurring); accord *Riley* v. *California*, 573 U.S. 373, 401 (2014); Pet. Br. 40–43. Nor does the State dispute that when seeking a warrant *would* threaten its ability to collect reliable BAC evidence, it may perform a warrantless blood draw pursuant to the exigent-circumstances exception. These points should be dispositive: the State has identified no interest that would justify dispensing with the warrant requirement in the context of unconscious drivers.

Instead, the State emphasizes its compelling interest in combating and prosecuting drunk driving. Br. 48–49. The strength of that interest is undisputed — but that is not the dispositive question. Rather, this Court has focused on the State's more specific justification for "demanding the * * * intrusive alternative" of a blood test "without a warrant." *Birchfield*, 136 S. Ct. at 2184; *Skinner v. Railway*

Labor Execs.' Ass'n, 489 U.S. 602, 628 (1989) (considering not simply the government interest in enforcing its law, but its interest in performing the search without a warrant or individualized suspicion). And the Court has concluded that the interest in proceeding without a warrant in the case of conscious drivers is slight, because obtaining a warrant "when there is sufficient time to do so in the particular circumstances" will not impede the State's ability to obtain BAC evidence. *Birchfield*, 136 S. Ct. at 2184. The unconsciousness of a driver does not change that conclusion.

The State also suggests, without support, that obtaining a warrant by telephonic or electronic means might delay necessary medical treatment when a driver is unconscious because he has been in a car accident. Br. 54–55. But when an individual requires immediate medical attention, police officers ordinarily address that need before seeking a warrant — and if officers conclude as a result that there is no time to seek a warrant, they may rely on exigent circumstances to proceed with the blood draw. See, *e.g.*, *Kansas* v. *Chavez-Majors*, 402 P.3d 1168, 1184 (Kan. Ct. App. 2017) (upholding blood test under exigent-circumstances exception where officers first addressed defendant's injuries); *Minnesota* v. *Stavish*, 868 N.W.2d 670, 677–678 (Minn. 2015) (officers arranged for emergency medical care rather than seeking warrant; exigent circumstances justified warrantless blood draw); *Dennison* v. *Texas*, No. 09-15-00525-CR, 2017 WL 218911, at *9 (Tex. Ct. App. Jan. 18, 2017) (upholding warrantless blood test where

officers were occupied securing accident scene and addressing injuries).[8]

Finally, the State suggests in passing that the exigent-circumstances exception does not adequately protect its interests because "determining whether an exigency exists requires guesswork." Br. 32. But as the *McNeely* plurality observed, "[n]umerous police actions are judged based on fact-intensive, totality of the circumstances analyses rather than according to categorical rules," and "we expect that officers can make reasonable judgments about whether the warrant process would produce unacceptable delay under the circumstances." 569 U.S. at 158 & n.7. When officers make such judgments, moreover, reviewing courts assess them from the perspective of the reasonable officer at the scene, giving appropriate deference to the officer's expertise and his need to make in-the-moment judgments. See *ibid.*; *Ryburn* v. *Huff*, 565 U.S. 469, 477 (2012) (per curiam). There is no reason to think that officers will not be able to operate under the exigent-circumstances framework here as they do in other contexts.

In sum, no governmental interest supports a categorical exception to the warrant requirement for unconscious drivers.[9] Because the significant privacy

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[8] In any event, this case illustrates that unconscious-motorist cases will not invariably involve serious car accidents. Petitioner was conscious when arrested, and then spent an hour at the police station before police decided to take him to the hospital to perform an evidentiary blood draw; he lost consciousness during this second trip.

[9] The State also relies on *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444 (1990), and *Maryland* v. *King*, 569 U.S. 435 (2013),

interest outweighs the law-enforcement interest in proceeding without a warrant, the State may not impose unconscious blood draws as a condition of driving.

C. Driving is not a highly regulated activity.

Perhaps recognizing the difficulty of arguing that its interests in dispensing with a warrant outweigh the substantial privacy interests at stake, the State argues (Br. 45–46) that driving is a highly regulated activity. Therefore, in the State's view, it need not offer as weighty a justification to impose a warrantless blood test. That argument is foreclosed by this Court's decisions.

This Court has repeatedly declined to expand the "pervasively regulated business" doctrine beyond the narrow industries in which it was first applied. *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 313 (1978) ("[t]he clear import of our cases is that the closely regulated industry * * * is the exception"); Pet. Br. 35–36. And in *City of Los Angeles* v. *Patel* — a decision that the State does not acknowledge — this Court

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but neither suggests that the search here is a reasonable condition. *Sitz* was not a conditions case, but instead involved a sobriety checkpoint analyzed under precedents holding that warrantless, suspicionless checkpoints are generally reasonable because of the minimal nature of the intrusion. *Sitz*, 496 U.S. at 452–453. Similarly, *King* upheld suspicionless DNA swabs of arrestees based on the slight nature of the intrusion and the State's strong interest in accurately identifying individuals it had arrested. Neither decision involved the much greater intrusion at issue here. Indeed, neither *Birchfield* nor *McNeely* suggested that *Sitz* or *King* was relevant to its assessment of the reasonableness of blood tests on individuals suspected of drunk driving. *Birchfield*, 136 S. Ct. at 2183–2186; *McNeely*, 569 U.S. at 151–156.

declined to expand the doctrine to the hotel industry precisely because "[t]o classify hotels as pervasively regulated would permit what has always been a narrow exception to swallow the rule." 135 S. Ct. 2443, 2455 (2015). That point is dispositive here. Driving is a common, everyday activity — indeed, a practical necessity — for most citizens. In 2018, 83 percent of adult survey respondents reported that they drive every day or most days.[10] Classifying driving as a highly regulated industry would subject millions of people to warrantless searches.[11]

The State's argument, moreover, cannot be reconciled with *McNeely* and *Birchfield*. The *McNeely* plurality explained that although driving on a public highway is a state-granted "privilege" subject to considerable regulation, that fact "does not diminish a motorist's privacy interest in preventing an agent of the government from piercing his skin." 569 U.S. at 159 (plurality op.); accord *id.* at 174 (Roberts, C.J., joined by Alito and Breyer, JJ., concurring). And *Birchfield* analyzed the reasonableness of a condition imposed on driving, and concluded that the condition exceeded the "limit[s]" on such conditions — without

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[10] Megan Brenan, 83% of U.S. Adults Drive Frequently; Fewer Enjoy It a Lot (2018), https://news.gallup.com/poll/236813/adults-drive-frequently-fewer-enjoy-lot.aspx.

[11] The State also suggests that driving while intoxicated should be considered a heavily regulated activity because the liquor industry is heavily regulated. Br. 46 (citing *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970)). But it is quite a leap from permitting warrantless administrative searches of businesses involved in the liquor industry in the course of verifying regulatory compliance to permitting warrantless searches of individuals suspected of criminal offenses involving alcohol. This Court has never suggested that such searches would be permissible simply because alcohol is involved.

suggesting that the analysis should proceed on the understanding that driving falls within the heavily regulated industry doctrine. 136 S. Ct. at 2185. Had the Court believed that the doctrine was applicable, it surely would have proceeded on that basis.

Finally, the State emphasizes that this Court has upheld various suspicionless drug testing regimes under the reasonableness balancing test. In those situations, however, the searches were justified by interests distinct from ordinary law-enforcement needs. See, *e.g.*, *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 653 (1995) (interest in deterring drug use in children was a "special need[], beyond the normal need for law enforcement") (citation omitted); *Skinner*, 489 U.S. at 620, 641 n.5 (1989) (noting that drug tests were for safety purposes and results were not turned over to law enforcement); *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 666 (1989) (same). And cases involving searches of probationers and parolees relied on the reduced expectation of privacy resulting from the extensive supervision inherent in that status. *Samson* v. *California*, 547 U.S. 843, 852 (2006). Here, by contrast, only ordinary law-enforcement interests are at stake, and this Court has already held that a motorist has a substantial and legitimate privacy interest "in preventing an agent of the government from piercing his skin." *McNeely*, 569 U.S. at 159.

D. Requiring a warrant serves important public purposes.

Finally, the State argues that requiring a warrant absent exigent circumstances will not protect individual privacy interests. It argues, citing

Birchfield, that there is no need for a "neutral magistrate" to evaluate probable cause because the arresting officer's "own characterization of his or her observations" will be the basis for any probable cause, and a magistrate would "be in a poor position to challenge such characterizations." 136 S. Ct. at 2181.

Although the State relies on *Birchfield*'s statement that "requiring the police to obtain a warrant in every case" before performing a breath test "would impose a substantial burden but no commensurate benefit," that reasoning is not apposite here. 136 S. Ct. at 2181–2182. *Birchfield* considered the benefits offered by warrants in the context of breath tests — not blood tests — only after concluding that requiring a warrant before every breath test would impose a significant burden on law enforcement. *Id.* at 2181. Here, requiring a warrant before blood draws on unconscious motorists will not impose that sort of burden. As the Court observed in *Birchfield*, there is "no reason to believe that such situations [*i.e.*, unconscious motorists] are common in drunk-driving arrests." *Id.* at 2184–2185. The State has not offered any evidence to the contrary. And for the reasons discussed above and in the opening brief, seeking a warrant does not impose any substantial burden on law enforcement. See pp. 13–16, *supra*; Pet. Br. 39–46.

In addition, the State's argument that warrants will serve no purpose here is in significant tension with the treatment of blood tests in *McNeely* and *Birchfield*. In *McNeely*, the Court emphasized that a blood draw is a significant bodily intrusion, and that "absent an emergency, no less [than a warrant] could be required where intrusions into the human body are concerned." 569 U.S. at 148 (citing *Schmerber* v. *California*, 384

U.S. 757, 770 (1966)). And the concurring Justices observed that in view of the significance of that intrusion, warrants are generally necessary to ensure that the intrusion is "justified," *i.e.*, to ensure that "that a neutral, detached judicial officer [has] review[ed] the case" and concluded "that there is probable cause for any search and that any search is reasonable." *Id.* at 174 (Roberts, C.J., joined by Alito and Breyer, JJ., concurring). Notably, neither the plurality nor the concurrence suggested that the fact that evidence of probable cause and the nature of the intrusion will be the same in most drunk-driving cases lessened the importance of the warrant requirement. And while the *Birchfield* Court concluded that requiring warrants would not confer significant benefits in the context of the much lesser intrusion of a breath test, the Court reaffirmed that warrants are generally necessary to justify blood draws. 136 S. Ct. at 2184.

Finally, the State's premise is wrong: there is no reason to think that cases involving unconscious drunk-driving suspects will present the same facts, or that the existence of probable cause can never be "subject to serious doubt." Br. 53. As this case illustrates, police officers may encounter an unconscious motorist under a variety of circumstances, and thus the evidence supplying probable cause may vary widely. See Pet. Br. 44–45. Police may encounter an unconscious motorist after a crash, or pulled over by the side of the road, or some distance from his vehicle. The existence of probable cause may turn on a variety of circumstances, such as the availability of eyewitness testimony, the smell (or lack thereof) of alcohol, and the presence of alcohol

containers in the car.[12] Absent exigent circumstances, whether a particular set of facts amounts to probable cause should be determined "by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U.S. 10, 14, (1948).

III. Petitioner's blood test may not be justified as a search incident to arrest.

In *Birchfield*, this Court held that warrantless blood draws of conscious individuals could not be justified as searches incident to arrest. In so doing, the Court acknowledged that some drivers might not be able to undergo breath testing because they are unconscious. But the Court stated that it had "no reason to believe that such situations are common in drunk-driving arrests," and that "when they arise, the police may apply for a warrant if need be." 136 S. Ct. at 2184–2185. That conclusion was correct, and the State provides no reason to depart from it here.

First, the State points out that a breath test is unavailable where a motorist is unconscious. Br. 56. But, of course, the Court was aware of that in *Birchfield*, and it still concluded that police should apply for a warrant in such situations. And because the search-incident-to-arrest exception involves balancing privacy interests against law-enforcement interests, the Court should conclude that the Fourth Amendment

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[12] See Brief of Colorado et al. as Amicus in support of Respondent, 13–14 (noting that establishing probable cause when motorist is unconscious may require consideration of broader range of facts than in "run-of-the-mill DUIs").

does not permit warrantless blood draws on unconscious individuals incident to their arrest for the reasons stated above.

Second, the State argues that contrary to *Birchfield*'s statement, unconscious driver situations "occur[] far too often." Br. 56. However, neither it nor the state amici offer any evidence of the incidence of unconscious motorists suspected of drunk driving. The State clearly has a compelling interest in combating drunk driving, including when motorists lose consciousness. But obtaining a warrant in the absence of exigent circumstances will not impede that interest.

Third, the State repeats its arguments that the intrusion on an individual's privacy interests is less severe when the individual is unconscious. That argument fails for the reasons stated above. See pp. 9–13, *supra*.

In short, the State has given the Court no reason to retreat from *Birchfield*'s conclusion — where a breath test is unavailable, police can and should "get a warrant" for a blood test.

IV. The State has waived any argument that the BAC evidence should not be suppressed.

The State argues, for the first time and in a footnote, that even if this Court holds that the blood draw was unconstitutional, it should remand to state court, apparently to provide the State an opportunity to argue that the evidence should not be suppressed under *Heien* v. *North Carolina*, 135 S. Ct. 530 (2014). Br. 57 n.31. This Court should decline to do so. Because the State failed to present this argument in the trial court,

the intermediate appellate court, the Wisconsin Supreme Court, or to this Court in opposing certiorari, it is waived. The State should not be afforded an opportunity to present a new theory that it could have raised at any time during this nearly six-year-old litigation. If this Court holds that the blood draw was unconstitutional, the BAC evidence must be suppressed.

CONCLUSION

For the foregoing reasons, the judgment of the Wisconsin Supreme Court should be reversed.

Respectfully submitted.

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No. 18-6210

IN THE

Supreme Court of the United States

GERALD P. MITCHELL,

Petitioner,

—v.—

STATE OF WISCONSIN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND ACLU OF WISCONSIN, IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 1.7 million members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU regularly participates in cases before this Court involving the right to privacy protected by the Fourth Amendment. The ACLU was counsel of record in *Missouri v. McNeely*, 569 U.S. 141 (2013) and participated as amicus curiae in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). *See also, e.g., Carpenter v. United States*, 138 S. Ct. 2206 (2018); *Riley v. California* 134 S. Ct. 2473 (2014); *Maryland v. King*, 133 S. Ct. 1958 (2013). Because this case addresses an important Fourth Amendment question, its proper resolution is of substantial concern to the ACLU and its members.

The ACLU of Wisconsin is a statewide affiliate of the national ACLU and has approximately 13,500 members throughout Wisconsin. The protection of privacy is of special concern to the organization, which has submitted briefs in or litigated a number of state and federal cases involving the application of the Fourth Amendment. *See, e.g., State v. Sveum*, 787 N.W.2d 317 (Wis. 2010) (GPS vehicle tracking); *Belleau v. Wall*, 811 F.3d 929 (7th Cir. 2016) (GPS

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than amici curiae, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief. Both parties have given their consent to this filing in letters that have been lodged with the Clerk of the Court.

ankle monitors); *United States v. Patrick*, 842 F.3d 540 (7th Cir. 2016) (cell-site simulator ("stingray") location tracking).

SUMMARY OF ARGUMENT

An unconscious person cannot freely and voluntarily consent to a search. For consent to a search to be truly voluntary, the individual providing consent must have the freedom to change her mind. The right to deny or revoke consent—whether through refusal, limitation, or withdrawal—is essential for consent to a search to be "voluntary."

An unconscious person is incapable of making a choice, and thus cannot voluntarily consent. An unconscious person also cannot change her mind, and therefore has no opportunity to revoke or amend consent as a search is being conducted. Thus, this Court has recognized that consent cannot be given where "a person is unconscious or drugged or otherwise lacks capacity for conscious choice." *Schneckloth v. Bustamonte*, 412 U.S. 218, 224 (1973).

Both Fourth Amendment jurisprudence and a wide range of other legal doctrines recognize that where the authority to act rests on an individual's consent, the consent must be voluntary, and the individual must be free to make a choice *not* to consent, and to *withdraw* or *revoke* consent at any time. In the law of rape, for example, a person's consent to sexual intercourse while conscious does not authorize her partner to have sexual intercourse with her while she is unconscious. This is so even if she has expressly agreed, while conscious, to sexual intercourse while she is unconscious, precisely because she would be unable to withdraw or revoke

such consent during intercourse. Similarly, because an unconscious person cannot choose to revoke or limit her consent to be searched, she cannot be said to have consented to a search, irrespective of the circumstances of any prior consent.

The fact that by statute, Wisconsin seeks to impute what it calls "consent" to everyone who drives an automobile in the state does not alter the result. This Court has suggested that, as a matter of the state's *authority to regulate the roads*, the state may impose civil and evidentiary consequences on those who decline to submit to a blood draw. But a statutory presumption cannot determine, *as a Fourth Amendment matter*, whether an individual has in fact consented to a particular search; that inquiry must be conducted on a case-by-case, "totality of all the circumstances" basis, *Schneckloth*, 412 U.S. at 227, and requires that the individual maintains the ability to revoke or delimit consent before completion of the search. Because an unconscious person cannot make a choice at all, the state cannot constitutionally impute an irrevocable presumption of "consent" on an unconscious person merely because she has driven on the state's roads.

The harm caused by driving while intoxicated is indisputable. But Wisconsin and other states have many other adequate means to combat driving under the influence that do not require deeming unconscious individuals to have "consented" to a search that they have no opportunity to decline. For instance, this Court has held that states may require breath tests incident to lawful arrests for drunk driving. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2184 (2016). The Court has also suggested that they

may impose civil and evidentiary consequences on conscious individuals who decline blood draws, so long as the motorists remain free to choose to say no. Officers may obtain a warrant based on probable cause where an individual is unconscious, as this Court has previously noted. *Id.* at 2184–85. And an officer may conduct blood draws without a warrant where she has probable cause to believe that an individual was driving under the influence and exigent circumstances preclude obtaining a warrant in a timely fashion.

ARGUMENT

I. A BLOOD TEST IS AN INVASIVE BODILY SEARCH THAT PRESUMPTIVELY REQUIRES A WARRANT.

"[T]he taking of a blood sample . . . is a search." *Birchfield*, 136 S. Ct. at 2173. A blood draw is a physical intrusion into a person's body that requires using a needle to pierce the skin, locate and puncture a vein, and extract a part of the person's bodily fluids. *Id.* at 2178; *Missouri v. McNeely*, 569 U.S. 141, 148 (2013). A bodily intrusion without consent, even if it does not cause physical harm or put a person at medical risk, invades "an individual's 'most personal and deep-rooted expectations of privacy.'" *McNeely*, 569 U.S. at 148 (quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985)). For some, blood tests raise issues of "fear, concern for health, or religious scruple." *See Schmerber v. California*, 384 U.S. 757, 771 (1966). And "[s]ome individuals have compelling medical reasons for refusing blood draws, such as hemophilia or ongoing anticoagulant therapy." Jacob M. Appel, *Nonconsensual Blood*

Draws and Dual Loyalty: When Bodily Integrity Conflicts with the Public Health, 17 J. Health Care L. & Pol'y 129, 150 (2014).

A blood draw can also expose a vast amount of highly personal information far beyond Blood Alcohol Content (BAC). It "places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading." *Birchfield*, 136 S. Ct. at 2178. Blood tests "can reveal a host of private medical facts about [a person], including whether he or she is epileptic, pregnant, or diabetic" *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989). They can also reveal, for example, whether a person has a sexually transmitted disease, certain medications she is taking, her cholesterol level, and even her DNA.[2] Thus, "[e]ven if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested." *Birchfield*, 136 S. Ct. at 2178. Each of these concerns is just as salient for a person unconscious at the time of the invasion. *See United States v. Booker*, 728 F.3d

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[2] *See, e.g.*, Elizabeth Boskey, *STDs Detected By Blood Tests*, verywellhealth.com (Nov. 29, 2018), https://www.verywellhealth.com/can-i-get-an-std-blood-test-3132740 (explaining that blood tests can reveal whether someone has herpes, HIV, syphilis, and hepatitis B and C); *Common Lab Tests*, Cleveland Clinic Martin Health, https://www.martinhealth.org/common-lab-tests-mhs (last visited Feb. 20, 2019); Souvik Ghatak et al., *A simple method of genomic DNA extraction from human samples for PCR-RFLP analysis*, 24(4) J. Biomolecular Tech. 224–31 (2013).

535, 539–40 (6th Cir. 2013) (holding that defendant's Fourth Amendment rights were violated even though he was unconscious at the time of the search).

Because blood tests entail both an invasive bodily intrusion and potential exposure of vast amounts of private information, they presumptively require a warrant based on probable cause. *McNeely*, 569 U.S. at 148, 152. "The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great." *Schmerber*, 384 U.S. at 770.

II. AN UNCONSCIOUS PERSON CANNOT CONSENT TO A SEARCH.

Where an individual consents to a search, the government need not obtain a warrant or have probable cause. But consent must be "freely and voluntarily given." *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). "[T]he Fourth and Fourteenth Amendments require that [the state] demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." *Schneckloth*, 412 U.S. at 248–49.

An unconscious person cannot consent to a search. In order for consent to be voluntary, an individual must have the opportunity to make a *choice*, and an unconscious person lacks the ability to choose. Accordingly, this Court has recognized that consent cannot be given where "a person is unconscious or drugged or otherwise lacks capacity for conscious choice." *Id.* at 224.

The ability to make a free choice is essential to the Fourth Amendment doctrine of consent. Thus,

consent is invalid if it is "given only after the official conducting the search has asserted that he possesses a warrant." *Bumper*, 391 U.S. at 548. By claiming to have a warrant the officer "announces in effect that the occupant has *no right to resist* the search." *Id.* at 550 (emphasis added); *see also Amos v. United States*, 255 U.S. 313, 317 (1921) (holding that where officers demanded admission to search "under government authority," search was not conducted pursuant to voluntary consent).

Relatedly, the ability to change one's mind and resist the search by delimiting or revoking consent is integral to the very concept of voluntary consent. A person who consents to a search "may of course delimit as he chooses the scope of the search to which he consents." *Fla. v. Jimeno*, 500 U.S. 248, 252 (1991). An individual who grants consent to a search must, at any point up to the completion of the search, have the ability to withdraw or amend that consent. In *United States v. Ho*, for example, the defendant initially consented to a search of his person and portfolio, but during the search he "struggled to retrieve the portfolio." 94 F.3d 932, 934 (5th Cir. 1996). The court of appeals held that the officer could not "continue the warrantless search of Ho's portfolio" because "[a] consent which waives Fourth Amendment rights may be limited, qualified, or withdrawn." *Id.* at 934, 936 n.5. All courts of appeals to address the issue have recognized that consent to a search may be freely revoked or limited at any time before or during a search. *See United States v. Williams*, 898 F.3d 323, 329 (3d Cir. 2018), *cert. filed*, No. 18-7726 (Feb. 1, 2019) ("Relying on *Florida v. Jimeno*'s recognition that a consensual search may be restricted by individuals, our sister circuits that

have considered whether individuals may withdraw consent to search have unanimously answered in the affirmative. Today, we join them.").[3] Indeed, in this very case, the Wisconsin Supreme Court recognized that "[o]f course, consent voluntarily-given before a blood draw may be withdrawn with or without a statutory reminder." *State v. Mitchell*, 914 N.W.2d 151, 161 (Wis. 2018).

An unconscious person cannot deny, limit, or withdraw consent. Indeed, an unconscious person can make no choice at all, and therefore cannot be deemed to have consented to a search.

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[3] *See Williams*, 898 F.3d at 329; *United States v. Wilmore*, 57 F. App'x 949, 953 (3d Cir. 2003) (unpublished); *United States v. Ortiz*, 669 F.3d 439, 445 (4th Cir. 2012); *United States v. Ho*, 94 F.3d 932, 934 (5th Cir. 1996); *Painter v. Robertson*, 185 F.3d 557, 567 (6th Cir. 1999); *United States v. Dyer*, 784 F.2d 812, 816 (7th Cir. 1986); *United States v. Sanders*, 424 F.3d 768, 774, 782 (8th Cir. 2005); *United States v. McWeeney*, 454 F.3d 1030, 1034 (9th Cir. 2006); *United States v. Manjarrez*, 348 F.3d 881, 888 (10th Cir. 2003); *United States v. Terry*, 220 F. App'x 961, 964 (11th Cir. 2007) (per curium) (unpublished); *United States v. Carter*, 985 F.2d 1095, 1097 (D.C. Cir. 1993); *United States v. Pelle*, No. CRIM. 05-407 (JBS), 2006 WL 436920, at *4 (D.N.J. Feb. 17, 2006); *United States v. Cadieux*, 324 F. Supp. 2d 168, 170 (D. Me. 2004); *United States v. Bily*, 406 F. Supp. 726, 729 (E.D. Pa. 1975); *United States v. Caro*, No. 86 CR 646, 1987 WL 10839, at *4 (E.D.N.Y. Apr. 28, 1987), *aff'd*, 863 F.2d 46 (2d Cir. 1988); *Baxter v. State*, 77 P.3d 19, 25 (Alaska Ct. App. 2003); *Burton v. United States*, 657 A.2d 741, 746 (D.C. 1994); *State v. Yong Shik Won*, 372 P.3d 1065, 1079 (Haw. 2015), *as corrected* (Dec. 9, 2015); *Byars v. State*, 336 P.3d 939, 945 (Nev. 2014); *State v. Villarreal*, 475 S.W.3d 784, 799 (Tex. Crim. App. 2014); *State v. Dunkel*, 143 P.3d 290, 293–94 (Utah Ct. App. 2006); ; *McNair v. Commonwealth*, 521 S.E.2d 303, 307–08 (Va. Ct. App. 1999). .

III. IN MULTIPLE LEGAL DOMAINS, VALID CONSENT REQUIRES THAT THE INDIVIDUAL BE CAPABLE OF FREELY GIVING AND LIMITING OR WITHDRAWING CONSENT DURING THE COURSE OF THE CONSENTED-TO ACTIVITY.

Consent is an operative legal concept in many domains beyond the Fourth Amendment. Two points emerge from the treatment of consent in multiple contexts. First, it must be given by someone who is capable of making a choice. Second, where authority to act rests on consent, the individual who consented must be capable of limiting or revoking consent at any time before the act is completed. As a result, one cannot generally impute consent to an unconscious person, who, by definition, has no opportunity to change her mind.

This principle has perhaps its strongest application in the context of sexual relations, where the presence or absence of consent marks the difference between sexual assault or rape, on the one hand, and a lawful, consensual encounter on the other. "The law is well settled that a sleeping, unconscious, or incompetent person cannot consent." *United States v. Lopez*, No. 201400373, 2017 WL 193265, at *3 (N-M. Ct. Crim. App. 2017) (internal quotation marks omitted)). Indeed, the Uniform Code of Military Justice includes among those "incapable of consenting" a person "who is physically incapable of declining participation in, or communicating unwilling[n]ess to engage in, the sexual act at issue." 10 U.S.C. § 920(g)(8)(B).

Moreover, even where a conscious individual has consented in advance to have sexual relations while unconscious, the consent is deemed invalid once an individual loses consciousness, because she loses the ability to withdraw consent. In *People v. Dancy*, for example, the court held that "advance consent" is not a defense to the rape of an unconscious person. 124 Cal. Rptr. 2d 898, 911 (Cal. Ct. App. 2002). It reasoned that "[w]hile a woman may expressly or impliedly consent to *conscious* sexual intercourse in advance, she remains free to withdraw that consent, and ordinarily has the ability to do so since she is conscious." *Id.* The situation is categorically different when the woman has become unconscious, however, because she can no longer make a choice. Thus, "[e]ven if a woman expressly or impliedly indicates in advance that she is willing to engage in *unconscious* sexual intercourse, a man who thereafter has intercourse with her while she is unconscious necessarily deprives her of the opportunity to indicate her lack of consent. . . . [T]he woman's lack of consciousness absolutely precludes her from making her lack of consent known at the time of the act." *Id.*; *see also United States v. Prather*, 69 M.J. 338, 343 (C.A.A.F. 2011) (rejecting argument in sexual assault case that "consent given before a victim became substantially incapable continues to be valid throughout the period of incapacity").[4]

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[4] A recent viral video addressing the issue of consent in the sexual relations context underscores the point. In the video, which uses tea as a stand-in for sex, the narrator says: "Maybe they were conscious when you asked them if they wanted tea, and they said 'yes.' But in the time it took you to boil the kettle, brew the tea and add the milk, they are now unconscious. Don't

Many other legal doctrines similarly recognize the principle that, where the authority to take an action vis-à-vis an individual rests on his consent, he must have the choice to withdraw consent. Under the Fifth Amendment, for example, a suspect who has voluntarily consented to waive his *Miranda* rights can revoke his waiver at any time. "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda v. Arizona*, 384 U.S. 436, 473–74 (1966).

Similarly, a subject who consents to share personal medical information by participating in a research study must be able to withdraw that consent. *See, e.g.*, 45 C.F.R. § 46.116(b)(8) (informed consent to participate in a research study requires that "the subject may discontinue participation at any time"); *see also* 45 C.F.R. § 164.508(b)(5) (HIPAA privacy rules require that "[a]n individual may revoke an authorization [for the use or disclosure of protected health information] provided under this section at any time").

The right to informed consent to medical treatment also includes the right to revoke consent. Medical "[c]onsent must be freely given and can be

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make them drink the tea. They said 'yes' then, sure, but unconscious people don't want tea." Deirdra O'Regan, *The Very British Video Helping Americans Understand Sexual Consent*, Wash. Post (June 10, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/06/10/the-very-british-video-helping-americans-understand-sexual-consent/?utm_term=.3fc60ec07cc2.

freely withdrawn at any time." Timothy J. Paterick et al., *Medical Informed Consent: General Considerations for Physicians*, 83(3) Mayo Clinic Proc. 313, 317 (2008). The right to withdraw consent is "a standard component of every informed consent protocol," and includes the right to withdraw consent at any time before or *during* a procedure. Claudine Yee et al., *Putting the "No" in Non Nocere: Surgery, Anesthesia, and a Patient's Right to Withdraw Consent*, R.I Med. J., Oct. 2017, at 38, 38.

Federal law recognizes that a parent can withdraw consent at any time to a school district's disclosure of a child's personally identifiable information. 34 C.F.R. § 300.154(d)(2)(v)(C); *see also* 20 U.S.C. § 7908(a)(2)(A) (providing that a student's parent can opt out of affording consent to a local education agency giving information about the student to a military recruiter or an institution of higher education). Federal law also recognizes that parents retain the right to revoke consent to their child's participation in certain educational instruction. *See* 34 C.F.R. § 300.300(b)(4) (granting that if a parent revokes consent to the continued provision of special education and related services the public agency may not continue to provide these services); 20 U.S.C. § 6312(3)(A)(viii)(I) (providing that parents of an English learner have the right to have their child immediately removed from a language instruction educational program upon their request).

Under property law, one who "remains on the land" after an owner withdraws his consent to enter the property is liable for trespass. Restatement (Second) of Torts §§ 158, 171 (Am. Law Inst. 1965).

Similarly, "[e]ven if consent is initially given, a plaintiff can state a claim for failure to restore things wrongfully acquired under [Cal. Civ. Code] § 1712 if the plaintiff later withdraws consent." *Snyder & Assocs. Acquisitions LLC v. United States*, 859 F.3d 1152, 1161 (9th Cir.), *opinion amended on reh'g*, 868 F.3d 1048 (9th Cir. 2017).

The right to revoke consent is also an important component of mediation and settlements. Under California law, for example, "unless the parties have agreed to a binding award, any party who voluntarily enters mediation may revoke its consent and withdraw from the dispute resolution process." *Jeld-Wen, Inc. v. Superior Court*, 53 Cal. Rptr. 3d 115, 118 (Cal. Ct. App. 2007); *see also Model Standards of Conduct for Mediators* Standard I(A) (Am. Arbitration Ass'n, Am. Bar Ass'n & Ass'n for Conflict Resolution 2005) (providing that "[p]arties may exercise self-determination at any stage of a mediation, including . . . withdrawal from the process"). Similarly, "[a] party may revoke his consent to settle a case anytime before judgment is rendered." *Samples Exterminators v. Samples*, 640 S.W.2d 873, 874–75 (Tex. 1982) (internal citation omitted); *see also Rodriguez v. Rodriguez*, 29 S.E.2d 901, 905 (N.C. 1944) (holding judgment was void because before the settlement was signed by the judge one party "withdrew her consent").

The rules governing professional responsibility for lawyers also recognize the principle that where consent is the basis for acting, the individual must have the right to change her mind. Thus, ABA Model Rule of Professional Responsibility 1.7 provides that a client may consent to the "existence of a concurrent

conflict," but Comment 21 makes clear that "[a] client who has given consent to a conflict may revoke the consent." *Model Rules of Prof'l Conduct* r. 1.7 (Am. Bar Ass'n 2018). Similarly, a client can consent to a "lawyer's reporting of information concerning abuse or mistreatment; however, the client is entitled to withdraw such consent thereafter." N.Y. City Bar Ass'n, Formal Opinion 1997-2 (1997).

Across all of these very different legal regimes, where the authority to act rests upon an individual's consent, the law recognizes both that the consent must be voluntary, and that the individual must retain the authority to change her mind and revoke or limit consent.

There are, of course, rare situations where conscious individuals can consent to particular actions after they lose consciousness. Thus, individuals can consent in advance to donate their organs if they are killed in an accident, or can sign "do not resuscitate" directives designed to govern when they are no longer able to make a conscious choice. A patient can provide advance consent to a surgical procedure to be conducted under general anesthesia.[5] But while there are a limited number of

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[5] As this Court has recognized, there is a constitutionally significant difference between surgery under general anesthesia pursuant to informed consent and that imposed by government edict. "When conducted with the consent of the patient, surgery requiring general anesthesia is not necessarily demeaning or intrusive. In such a case, the surgeon is carrying out the patient's own will concerning the patient's body and the patient's right to privacy is therefore preserved." *Winston*, 470 U.S. at 765. But where the same surgery is done at the direction of the government to search beneath a person's skin for

settings in which individuals may expressly consent in advance to certain actions being taken when they lose the ability to make a choice, states surely cannot impute such a "choice" to anyone, much less to everyone who drives a car within the state.

As demonstrated below, the state's ability to impute "consent" must at a minimum be limited to situations in which individuals retain the freedom to choose to revoke consent.

IV. STATES MAY NOT IMPUTE "CONSENT" TO SEARCH TO AN UNCONSCIOUS PERSON.

A plurality of the Wisconsin Supreme Court concluded that, by the terms of a Wisconsin statute, Mitchell was on notice that he could be subjected to a warrantless BAC search if he were found unconscious and an officer had probable cause to believe he had been driving under the influence—even where, as here, he was found not driving a car but walking on a beach. *Mitchell*, 914 N.W.2d at 154, 166–67. Wisconsin calls this "implied consent," but that is a misnomer. Wisconsin law simply imposes a presumption by law that every motorist has "consented" to this arrangement by driving on its roads.

As a matter of regulating motor vehicles, it may be permissible to impose civil sanctions on those

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evidence of a crime, it "involves a virtually total divestment of [the person's] ordinary control," and imposes upon his "most personal and deep-rooted expectations of privacy." *Id.* at 760, 765.

who refuse a BAC test. *See Birchfield*, 136 S. Ct. at 2185. The distinct Fourth Amendment question of whether an individual has actually consented to a particular search, however, requires a "totality of all the circumstances" case-by-case inquiry, *Schneckloth*, 412 U.S. at 227, and therefore cannot be determined by a state law presumption. A statutory imputation of "consent" may be a relevant factor to consider in determining whether, under the totality of the circumstances, an individual who is conscious has in fact consented to a search. But where the individual being searched is unconscious and incapable of making a choice (or changing her mind), she cannot be said to have consented in any meaningful sense.

All 50 states have "implied consent" statutes that impose administrative consequences, such as license revocation, if a driver refuses to take a BAC test. *See* Nat. Highway Traffic Safety Admin., *Digest of Impaired Driving and Selected Beverage Control Laws* (30th ed. 2017) (current as of Dec. 31, 2015). Virtually all such statutes recognize, however, that individuals may change their minds and refuse consent at the time of the search, subject to certain consequences.[6] That recognition is consistent with

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[6] *See, e.g.*, Wis. Stat. Ann. § 343.305(4) (requiring driver be given a warning "[a]t the time that a chemical test specimen is requested" that "[i]f you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court."); Mo. Ann. Stat. § 577.041(2) (providing that a person who was operating a vehicle "shall further be informed that his or her license shall be immediately revoked upon refusal to take the test"); Cal. Veh. Code § 23612(a)(1)(D) ("The person shall also be told that his or her failure to submit to, or the failure to

the Fourth Amendment, which requires that the opportunity to refuse consent is necessary for consent to a search to be voluntary. As one state court explained, "[i]f an individual is subsequently stopped and read the implied consent advisory, the driver has the *choice* at that point whether to withdraw or ratify the consent." *McCoy v. N. Dakota Dep't of Transp.*, 848 N.W.2d 659, 668 (N.D. 2014) (emphasis added); *see also McNeely*, 569 U.S. at 161 (recognizing that "[s]uch laws impose significant consequences when a motorist *withdraws* consent" (emphasis added)).

While this Court has not yet squarely addressed their validity, it has in dicta approved of statutes that impose civil consequences on those who refuse a BAC blood draw. *Birchfield*, 136 S. Ct. at 2185; *McNeely*, 569 U.S. at 161 (plurality opinion).

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complete, the required breath, blood, or urine tests will result in" administrative consequences). A federal "implied consent" statute that applies to drivers in the special maritime and territorial jurisdiction also recognizes that a driver may "refuse[] to submit to such a test or tests" and face administrative and evidentiary consequences. 18 U.S.C. § 3118(b).

Puerto Rico mandates chemical testing even where a person "refuses, objects, resists or evades submitting to the alcohol, drug or controlled substance testing procedure," and provides that "he/she shall be arrested in order to be transferred to a medical-hospital facility for the personnel certified by the Department of Health to proceed to extract the pertinent samples." P.R. Laws Ann. Tit. 9, § 5209(a). Additionally, in the limited circumstance of "serious bodily injury or death," a person under arrest in Wyoming cannot refuse to submit to a chemical test. Wyo. Stat. Ann. § 31-6-102(d). The constitutionality of these outlier statutes has not been squarely tested.

When applied to conscious drivers, such statutes preserve the freedom to revoke consent—which, as we have seen above, is essential to make consent truly voluntary. Indeed, the very fact that these statutes specify consequences for saying "no" necessarily acknowledges the individual's right to refuse. *Cf. Aviles v. Texas*, 571 U.S. 1119 (2014) (order vacating and remanding for further consideration in light of *McNeely* a court's determination that, despite the driver's refusal, a warrantless blood draw based on an implied consent statute did not violate the Fourth Amendment); *Aviles v. State*, 443 S.W.3d 291, 294 (Tex. App. 2014) (explaining on remand that the "mandatory blood draw statute and the implied consent statute . . . clearly create categorical or per se rules the *McNeely* court held were not permissible exceptions to the Fourth Amendment's warrant requirement").

Birchfield held that there are Fourth Amendment limits to the consequences a state can impose for withdrawing consent. In particular, "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Birchfield*, 136 S. Ct. at 2186. Criminal consequences, the Court reasoned, are inconsistent with the notion of voluntary consent. *Id.* If the government cannot *constrain* an individual's free choice to consent to a search by imposing criminal penalties, it also cannot impute consent where the individual has *no ability* to choose whatsoever. The choice does not have to "be an easy or pleasant one for a suspect to make," *S. Dakota v. Neville*, 459 U.S. 553, 564 (1983), but as a Fourth Amendment matter, there must be a choice. And an unconscious person has no ability to choose.

Wisconsin suggests that it is the driver's own fault if he is unconscious. Br. in Opp. 16–17. But a person may be unconscious for reasons having nothing to do with intoxication. He may have been injured in a car accident, suffered a seizure or stroke, or fainted or choked. And even if an individual is unconscious by his own voluntary actions, that does not amount to consent to a search. That a person is unconscious—irrespective of the cause—cannot justify depriving him or her of the opportunity to withdraw consent.

Wisconsin maintains that a BAC blood draw furthers a "vital government interest" in a "serious area." Br. in Opp. 19. Deterring driving while intoxicated is indisputably an important government interest. *See, e.g., Birchfield*, 136 S. Ct. at 2166, 2178–79. But the gravity of the state interest has no bearing on the voluntariness of an individual's consent to a search. There are not different consent standards for searches aimed at detecting murderers on the one hand and shoplifters on the other.

Moreover, the consequences of accepting Wisconsin's "vital government interest" argument would be draconian. States also have a vital interest in deterring speeding and texting while driving, but surely Wisconsin could not impute consent to warrantless searches of cellphones or GPS devices as a condition of driving on the road, without at least affording a right to withdraw such consent. *Cf. Riley v. California*, 134 S. Ct. 2473, 2495 (2014) ("Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant."); *United States v. Jones*, 565 U.S. 400, 430 (2012) (Alito, J.,

concurring) ("[T]he use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy . . . [and] where uncertainty exists with respect to whether a certain period of GPS surveillance is long enough to constitute a Fourth Amendment search, the police may always seek a warrant").

V. STATES HAVE ADEQUATE MEANS TO DETER AND PROSECUTE DRUNK DRIVING WITHOUT IMPUTING CONSENT TO UNCONSCIOUS MOTORISTS.

In *Birchfield*, the Court considered the fact that a blood test, but not a breath test, could be administered on "a person who is unconscious (perhaps as a result of a crash)" but explained that when such situations arise "the police may apply for a warrant if need be." 136 S. Ct. at 2184–85. That remains true today. Wisconsin points to no substantial change in the less than three years since *Birchfield* was decided that should make this Court rethink its conclusion that an officer who has probable cause to believe an unconscious driver is intoxicated must obtain a warrant.

And as with any other search, a BAC blood test may be procured where the officer has probable cause and exigent circumstances in a particular case preclude obtaining a warrant in a timely fashion. *McNeely*, 569 U.S. at 156 ("[E]xigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant application process"); *see Schmerber*, 384 U.S. at 770–71 (applying exigent

circumstances test and concluding that warrantless blood test was constitutional). This exigent circumstances exception applies equally when someone is unconscious.

If there is probable cause that a motorist was driving while intoxicated, the state will generally be able to obtain evidence of that criminal offense, either pursuant to a warrant or under the exigent circumstances exception, where appropriate. These options give the state sufficient means to ensure that driving under the influence can be prosecuted and deterred.

CONCLUSION

For the reasons stated above, the judgment of the Supreme Court of Wisconsin should be reversed.

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No. 18-6210

In The Supreme Court of the United States

GERALD P. MITCHELL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Wisconsin

BRIEF OF *AMICUS CURIAE* CALIFORNIA DUI LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae California DUI Lawyers Association (CDLA) respectfully requests to file the attached *Amicus Curiae* Brief in support of the Petitioner, Gerald P. Mitchell.

The Court's decision in this matter will have a significant impact on driving under the influence litigation in the State of California. CDLA seeks to make this Court aware of CDLA's views. CDLA has been an *amicus* in some of the leading DUI cases in California. See *People v. McNeal*, 46 Cal.4th 1183, 96 Cal.Rptr.3d 261 (2009); *People v. Vangelder*, 58 Cal.4th 1, 164 Cal.Rptr.3d 522 (2013); *People v. Harris*, 234 Cal.App.4th 671, 184 Cal.Rptr.3d 198 (2015). CDLA has been an *amicus* in the California Supreme Court in the Confrontation Clause related case of *People v. Dungo*, 55 Cal.4th 608, 147 Cal.Rptr.3d 527 (2012), and in the Confrontation Clause related case in this Court in the case of *Williams v. Illinois*, 567 U.S. 50, 132 S. Ct. 2221 (2012). CDLA is also an *amicus* in the pending California Supreme Court case of *People v. Arredondo* (Case Number S233582). One of the issues in *Arredondo* is nearly identical to the issue presented in this case. The Court's determination here will have a significant impact on the outcome of *Arredondo*.

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[1] Pursuant to Rule 37.6, counsel for *amicus* state that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation of this brief. The parties have provided CDLA with written consent to the filing of an *amicus* brief.

CDLA is a non-profit organization and has well over three hundred members throughout California. Collectively, CDLA members likely represent thousands of citizens each year who are accused of driving under the influence. As a representative of the California DUI defense bar, CDLA's members have vast experience in DUI Fourth Amendment litigation. Much of this experience pertains to warrantless searches and seizures of blood samples pursuant to California's implied consent statute, which is quite similar to the Wisconsin implied consent statute at issue in this case. CDLA respectfully maintains that its brief will assist the Court in deciding this matter.

SUMMARY OF ARGUMENT

Implied consent laws impose an unconstitutional condition on motorists. If a person wants to drive on a highway, implied consent laws deem that they have consented to a warrantless seizure of their blood, breath, or in some cases urine, if they are arrested for driving under the influence. If the driver becomes unconscious, implied consent laws like the Wisconsin statute at issue here, deem that they have consented to a taking of their blood without a warrant. But this Court, in *Missouri v. McNeely*, 569 U.S. 141 (2013), held that such a taking is not permitted absent some exception to the warrant requirement. Because implied consent laws are ubiquitous, and because of the number of people these laws reach, implied consent laws have

resulted in one of the greatest takings of Fourth Amendment rights in American history.

State governments have a monopoly on the issuance of driver's licenses, and own most of the roads on which people travel. For millions of people, driving is a necessity. This is particularly true in a state like California where rapid transit is often not readily available. Since for most persons driving is a must, monopolist state governments can dictate the terms for driving. And most people have no real choice but to accept those terms. That is because the choice is one between waiving their Fourth Amendment rights, and abandoning the opportunity to drive. The latter option almost ensures sacrificing the prospect of leading a normal modern life.

Those who acquiesce (which is essentially everyone) are simply yielding to the power of the government. The choice is illusory, unconstitutional, and it is unnecessary. If the police want to obtain a blood sample from a suspected impaired driver, and if for some reason they cannot obtain consent from that driver, the police may seek a warrant. And if the police cannot readily obtain a warrant (which now appears to be an increasingly unlikely scenario), then the blood sample may be taken pursuant to the exigent circumstances doctrine. In today's environment, those provisions of implied consent laws that authorize the warrantless search and seizure of a blood sample are both unneeded, and unconstitutional.

ARGUMENT

I. THE IMPLIED CONSENT LAWS VIOLATE THE UNCONSTITUTIONAL CONDITIONS DOCTRINE.

For many people in America, and for nearly all people of age in California, driving is a *must*. Driving is a necessity for those who have to travel any distance to get to work, pick the kids up from school, or simply complete the errands of modern life.

Because the need to drive is critical in today's world, the government can apply massive torque to those who want to drive the public highways. Almost all will tap to the government's demand that if they want to drive, they must consent to a waiver of their Fourth Amendment rights pursuant to implied consent laws.

The unconstitutional conditions doctrine prohibits the government from requiring the relinquishment of a constitutional right in order to secure a government benefit. The reason for the doctrine is to guard against efforts by the government to negotiate away constitutional rights, by offering needed benefits in exchange for the abandonment of those constitutional rights. The Court in *Frost v. Railroad Commission of State of Cal.*, 271 U.S. 583, 593-94, 46 S. Ct. 605 (1926), addressed this disquieting possibility by stating:

> If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United

States may thus be manipulated out of existence.

This manipulation is precisely what the implied consent laws accomplish. In *Frost*, the California legislature passed an Act (the Auto Stage and Truck Transportation Act of California) that required, as a condition of operating on the highways, that private carriers also become public carriers. This Court observed that on its surface, the Act seemed somewhat benign. The private carriers could just accept or reject the Act's conditions. The Court noted that in reality, there was no real choice for the private carriers. If the private carriers refused the state's condition to also become public carriers, the private carriers were out of business. On the other hand, if the private carriers accepted the government's condition, the record apparently indicated that the carriers could not economically survive.

In the Court's words, there was no alternative "except a choice between the rock and the whirlpool."[2] *Frost v. Railroad Commission of State of Cal.*, *supra*, 271 U.S. at 593. The Court found the Act

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[2] The Court's reference to *the rock and the whirlpool* appears to refer to a dilemma faced by sailors in Homer's epic, The Odyssey. The sailors had to pass a narrow strait, which was anchored on either side of the passage by a sea monster. One monster, Scylla, was a six-headed beast that resided in a cave inside a *rock*. On the other side of the strait was Charybdis, a sea monster that created treacherous *whirlpools*. Thus, there was no good option as to where to transit the strait. The choice was between the *rock and the whirlpool*. Homer, *The Odyssey*, Book XII, The Harvard Classics (1937 ed.) pp. 163-164.

unconstitutional as a violation of the due process clause of the Fourteenth Amendment. The Court held that while a state may have the power to completely deny a given privilege, it may not place upon the privilege conditions that "require the relinquishment of constitutional rights." *Frost v. Railroad Commission of State of Cal.*, 271 U.S. at 594.

More recently, in *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606, 133 S. Ct. 2586 (2013), this Court reached a similar conclusion. The *Koontz* opinion held that "the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." See also *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694 (1972) (Holding that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests. . . .").

Analogous governmental conditions were considered by the Court in *Speiser v. Randall*, 357 U.S. 513, 78 S. Ct. 1332 (1958). In that case, California demanded the relinquishment of a federal constitutional right in exchange for a government benefit. The benefit – a tax exemption – was denied to those veterans who refused to sign a declaration that relinquished their right to free speech. The Court found that the withholding of the benefit was effectively a punishment for exercising a constitutional right. "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for such

speech. . . ." *Speiser v. Randall, supra*, 357 U.S. at 518. The coercive effect of the condition was clear. The Court wrote that "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech." *Speiser v. Randall, supra*, 357 U.S. at 519.[3]

The implied consent laws present a similar scenario. The implied condition of forfeiting one's Fourth Amendment right against a warrantless search in order to drive has the same coercive effect. The implied consent laws require acceptance of this unconstitutional implied condition.

The court in *U.S. v. Scott*, 450 F.3d 863, 866-67 (9th Cir. 2006) discussed what can happen when a government monopoly is permitted to give benefits only in exchange for the relinquishment of constitutional rights. The court wrote:

> Government is a monopoly provider of countless services. . . . Giving the government free rein to grant conditional benefits creates the risk that the government will abuse its power by attaching strings strategically, striking lopsided deals and gradually eroding constitutional protections.

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[3] The Court's ultimate decision rested on the fact that there were no due process procedural safeguards in place to ensure that the exemption was denied only to those who engaged in unprotected speech.

The *Scott* court's prediction, like the *Frost* Court's fear, has come to fruition. In California, not only did the legislature enact an implied consent law similar to Wisconsin's, they later passed a law that *demands* a written waiver. Vehicle Code section 13384 provides that the department of motor vehicles *shall not* issue a driver's license *unless* the applicant gives written consent that, upon arrest for driving under the influence, they will submit to a chemical test without a warrant. See Cal. Veh. Code §13384. The statutory demand for a constitutional waiver is indeed one of the perils about which the court in *U.S. v. Scott*, *supra*, had warned.

The implied consent law has also abraded an arrestee's Fifth Amendment right to have a lawyer present during questioning. In California, if a person refuses to submit to a chemical test, and is convicted of driving under the influence, they can suffer additional incarceration. See Cal. Veh. Code §§23577 and 23538. Despite the potential ramifications of the arrestee's response to the officer's request for chemical testing, California's implied consent law *prohibits* drivers from first consulting a lawyer. See Cal. Veh. Code §23612(a)(4).

Further proof of the lopsidedness of the implied consent deal is that in the recent past, thousands of drivers have provided written consent pursuant to *non-existent statutes*. For several years, and up until at least mid-2017, driver's license renewal applicants in California were required to sign a form stating that they consent to the testing provisions contained in Vehicle Code sections 13388 and 23612. In fact, the

renewal forms had applicants agree to testing in accordance with Vehicle Code section 23137, which has been repealed, and Vehicle Code section 23157, which was replaced long ago.[4] (See CDLA *Amicus* Brief and Exhibit "A" attached thereto, filed in the California Supreme Court in *People v. Arredondo*, Case Number S233582.) It appears that for several years, possibly every driver who renewed their license in California had agreed to be bound by non-existent statutes. This reveals the enormous weight of the government's leverage. The need to drive has propelled these applicants to agree to whatever conditions the government has imposed. The end result is that implied "consent" in California is not what it purports to be. In fact it cannot be consent at all, because it is "instinct with coercion." *Bumper v. North Carolina*, 391 U.S. 543, 550, 88 S. Ct. 1788 (1968).

As one legal commentator wrote, where a constitutional right "functions to preserve spheres of autonomy . . . [u]nconstitutional conditions doctrine protects that [sphere] by preventing governmental end-runs around the barriers to direct commands." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1492 (1989). It is hard to imagine a *sphere*

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[4] Vehicle Code section 23137 was repealed in 1999. (See §§23137 to 23139. Repealed by Stats. 1998, c. 118 (S.B.1186), §§11.11 to 13, operative July 1, 1999.) Section 23157 was renumbered in 1999. (See §23157. Renumbered Vehicle Code §23612 by Stats. 1999, c. 22 (S.B.24), §18.4, eff. May 26, 1999, operative July 1, 1999.)

of autonomy more worthy of the doctrine's protection than one's body.

Implied consent laws have also impermissibly forced the choice between two fundamental constitutional rights – the right against unreasonable searches and seizures and the right to travel. This Court has recognized a federal constitutional right to travel. The Court held that the right may not be unreasonably burdened or restricted. In *Shapiro v. Thompson*, 394 U.S. 618, 629, 89 S. Ct. 1322 (1969), the Court wrote:

> This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.

Id. (overruled on other grounds by *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347 (1974)).

The California Supreme Court has held that when conditioning the receipt of a benefit upon the waiver of a constitutional right, the "government bears a heavy burden of demonstrating the practical necessity for the limitation." *Bagley v. Washington Township Hospital Dist.*, 65 Cal.2d 499, 505 (1966). And as discussed below, that heavy burden is not met by the implied consent law because there is no practical necessity for the law's conditions.

II. THERE IS NO NEED FOR STATES TO REQUIRE THE FORFEITURE OF DRIVERS' FOURTH AMENDMENT RIGHTS.

There is no need for the implied consent laws to serve as an exception to the warrant requirement. The already existing consent exception to the Fourth Amendment's warrant requirement routinely applies to searches of arrested persons' blood. Indeed, whether told of the implied consent statute's mandates or not, in CDLA's experience, most do not refuse an officer's request that they take a blood test.

But even if an arrested driver does not consent to a blood test, technological advancements now make obtaining warrants in the field a viable option. See Cal. Pen. Code §1526(b); see also *Missouri v. McNeely*, 569 U.S. 141, 154, fn. 4, 133 S. Ct. 1552 (2013) (Noting that in the majority of states, officers may now apply for warrants via email, telephone, video conferencing, and radio communication).

As for electronic warrants, the process in California has received positive reports. A review of the procedure and experience with electronic warrants issued by the San Bernardino County Superior Court is described on the California Courts website page as follows:

> Judicial review is provided by a standard browser application that can run on an iPad, or other mobile device. Judges can be notified of a warrant for processing by telephone, text message, or e-mail. . . . The response from

> judges and law enforcement has been very positive.

See California Courts, The Judicial Branch, *Electronic On-Call Warrants – San Bernardino Superior Court*, http://www.courts.ca.gov/27655.htm. (Noting also that several other Superior Courts in California use similar processes).

CDLA is also aware of reports of successful electronic warrant programs in other states. For example, the Chief of Police in Cheyenne, Wyoming indicated that telephonic warrants routinely take less than five minutes to obtain. Lindsey Erin Kroskob, *Police Take First Forced Blood Draw*, Wyoming Tribune-Eagle (August 19, 2011). And in Utah, the Salt Lake Tribune reported that an e-warrant for a blood draw in a driving under the influence investigation was obtained after only five minutes. Bergreen, *Faster Warrant System Hailed*, Salt Lake Tribune, Dec. 26, 2008, p. B1, col. 1.

Finally, if law enforcement is faced with a situation in which a warrant cannot be obtained in the field without substantially impairing the search, the exigent circumstances exception would apply. This finding is consistent with recent precedent. In *McNeely*, the Court wrote: "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Missouri v. McNeely*, *supra*, 569 U.S. at 152. It follows that if this is not possible, exigency would justify the search.

Either way, in today's world, there is no compelling need for the implied consent laws to serve as an exception to the warrant requirement.

CONCLUSION

The Fourth Amendment protects individuals against unreasonable searches and seizures by the government. The Amendment specifies that its protection covers things like a person's house, papers, and effects. But the first protection the Fourth Amendment provides – *the very first thing it guards against* – is unreasonable searches and seizures of the person. The Amendment begins by stating unequivocally that "[t]he right of the people to be secure in their *persons*, houses, papers and effects, against unreasonable searches and seizures shall not be violated. . . ." U.S. Constitution, amend. IV (emphasis added).

This case is about whether or not millions of people have to endure a violation of their rights just to drive a car. This case is about how much pressure the government can put on its people to obtain a waiver of their Fourth Amendment rights. And this case is about whether the search of a person's body should take place without judicial oversight.

It has long been the rule that a neutral and detached magistrate is essential in deciding whether or not the sanctity of a person's body can be breached by a government search. This Court stated this rule in

Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826 (1966). The Court wrote:

> The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt *is indisputable and great.*

Schmerber v. California, *supra*, 384 U.S. at 770 (internal citations omitted) (italics added).

The California DUI Lawyers Association asks this Court to reaffirm the importance of this *indisputable and great* principle.

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No. 18-6210

In the
Supreme Court of the United States

GERALD P. MITCHELL,
Petitioner,
v.
STATE OF WISCONSIN,
Respondent.

On Writ of Certiorari to the
Supreme Court of Wisconsin

BRIEF OF COLORADO, FLORIDA, GEORGIA, IDAHO, ILLINOIS, INDIANA, IOWA, KENTUCKY, LOUISIANA, MARYLAND, MINNESOTA, MONTANA, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, SOUTH CAROLINA, AND SOUTH DAKOTA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

This case concerns the constitutionality of a statute authorizing a warrantless blood draw from impaired drivers who are unconscious. Twenty-nine States have such statutes. In many cases prosecuted under those statutes, the suspect's unconsciousness was caused by an accident. Many of the state statutes authorizing blood draws from unconscious suspects specifically address situations where death or injury has been suffered by victims.

Also, all 50 States—even those not having unconscious driver provisions—have general implied consent statutes that could be impacted by this case. Like all implied consent statutes, the statutes with unconscious driver provisions operate on the principle that impaired suspects have consented to chemical testing by the act of driving. This case, involving an unconscious suspect who never withdrew his statutory consent, has implications for every form of implied consent statute.

The Amici States have an overwhelming interest in enforcing their implied consent statutes. These statutes play a critical role in the effort to eradicate the human "carnage" that is caused by impaired driving "with tragic frequency." *South Dakota v. Neville*, 459 U.S. 553, 558 (1983). "No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990).

SUMMARY OF THE ARGUMENT

I. States may condition the privilege of driving on consent to a blood draw when there is probable cause for an impaired driving offense, and the driver is unconscious.

a. This Court has recognized that implied consent statutes are valid. Under those statutes, people consent—by the act of driving—to providing a sample of their breath or blood for chemical testing, when there is probable cause. Most suspects cooperate with the police, but do so under an awareness that failure to cooperate can result in license revocation or other consequences. In light of those consequences, the voluntariness of their consent to testing is best understood to occur not during their interactions with the police, but instead during the wholly voluntary act of driving. With unconscious drivers, consent likewise occurs in the act of driving, not during interactions with the police.

b. Consent to any search can be withdrawn. If a conscious driver withdraws statutory consent, and no other exception to the warrant requirement exists, the police cannot obtain a test sample unless they obtain a warrant. Similarly, if a driver withdraws consent before falling unconscious—or is unconscious from the outset but becomes alert and withdraws consent before a sample is taken—the driver's withdrawal of consent must be honored. If, however, the unconscious driver never withdraws consent, the police may obtain a warrantless sample based on the driver's previously-given, statutory consent.

II. Warrantless blood draws from unconscious drivers, based on statutory consent, comport with the Fourth Amendment's requirement of reasonableness.

a. When a driver is unconscious, a State's interest in obtaining a warrantless blood sample is high. These cases typically involve an accident with victims who have suffered injury or death. One of the most effective tools normally available to the police—the ability to obtain cooperation with testing through a warning about the consequences of refusal—is unavailable. And the suspect's unconsciousness may have been due to a traffic accident or a medical event such as a seizure, rather than intoxication. It therefore takes longer to discern the existence of probable cause, and even longer to explain probable cause to a magistrate. All of these factors heighten the need for the police to obtain an expeditious, warrantless blood sample, before the suspect's alcohol level dissipates.

b. A warrantless blood draw unquestionably implicates privacy interests, but when a driver is unconscious, the usual analysis of those interests must be altered. Timely samples will show some suspects to be innocent, and unconscious drivers are unable to communicate their desire to undergo a blood draw. And in any event, with unconscious drivers, a blood draw causes no pain, anxiety, embarrassment, or even inconvenience. In this particular context, the interests of the individual are outweighed by those of the public.

ARGUMENT

I. States may condition the privilege of driving on consent to a blood draw when an impaired driver is unconscious.

In *Breithaupt v. Abram*, 352 U.S. 432, 435–40 (1957), this Court held that a warrantless blood draw from an unconscious, impaired driver does not violate due process. Such a blood draw likewise does not violate the Fourth Amendment's prohibition on unreasonable searches, in States where drivers have statutorily—through the act of driving—given their consent. Although consent to a search can be withdrawn before a search occurs, unconscious drivers typically have done nothing to withdraw their consent.

A. This Court has properly recognized statutory consent provisions as valid.

The Fourth Amendment prohibits searches of persons that are "unreasonable," and, for a search to be reasonable, police officers usually must obtain a warrant. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016). The warrant requirement, however, has several exceptions, and one exception is when a person has given consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Consent searches are valid only if they are voluntary; the person's cooperation must not be the result of duress or coercion. *Id.* at 219, 248. For consent to be valid, the person need not know that they have a right to refuse, *id.* at 231–43, but they must do more than merely acquiesce to an officer's claim of authority to conduct a search. *Bumper v. North Carolina*, 391 U.S. 543, 549 (1968).

Although breath and blood tests are Fourth Amendment searches, *Skinner v. Railway Labor Executive's Ass'n*, 489 U.S. 602, 616–17 (1989), this Court has recognized that States may require drivers to cooperate with such searches by enacting "implied consent" statutes. Those statutes make the driver's cooperation a condition of driving, and the statutes induce the driver's cooperation by imposing sanctions for refusing. For example, refusing to cooperate with chemical testing can result in administrative license revocation. *See Mackey v. Montrym*, 443 U.S. 1, 11–19 (1979). Refusal can also result in admitting in evidence, at a criminal trial, a driver's statement of refusal—regardless of whether the driver was warned. *South Dakota v. Neville*, 459 U.S. 553, 558–66 (1983). While States may not go so far as to criminalize a refusal to undergo a blood draw, States *are* allowed to criminalize a refusal to take a breath test. *Birchfield*, 136 S. Ct. at 2184–86. And if the driver acquiesces to testing, the test results are admissible in a criminal trial. *See Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016) (recognizing that the Court has referred approvingly to implied consent statutes as a means of obtaining evidence); *Missouri v. McNeeley*, 569 U.S. 141, 160–61 (2013) (plurality opinion) (recognizing that implied consent statutes are one of the "broad range of legal tools" States may use to obtain evidence of a driver's blood alcohol content, or "BAC").

Here, unconscious drivers, by definition, cannot consent at the time of a search. Instead, the voluntariness of their search must be found in the statutory consent drivers give when they engage in the voluntary act of driving. To be sure, drivers do not, by

the mere act of driving, literally verbalize their consent; their consent instead is inferred from the circumstances. *See Birchfield*, at 2185 (noting that the Court has "referred approvingly to the general concept of implied consent laws" and that "sometimes consent to a search need not be express but may be fairly inferred from the context"). In *Birchfield*, the Court cited two other examples of implied consent from different contexts. The first was *Florida v. Jardines*, 569 U.S. 1, 7–8 (2013), which recognized that homeowners implicitly consent that anyone can approach their front door to knock. The second was *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978), which recognized that some activities are so pervasively regulated that anyone embarking on them voluntarily chooses to be subject to a full arsenal of governmental regulation.

While the regulated activities discussed in *Marshall* were businesses, *see United States v. Biswell*, 406 U.S. 311, 316 (1997) (firearms); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 74, 77 (1970) (liquor), there are non-business activities that are pervasively regulated, including driving. To drive legally in any state, a person must be licensed, and a failure to comply with certain conditions can lead to the license being revoked. *See Mackey*, 443 U.S. 1, 11–19. Drivers can be seized if their vehicles do not have the required number of functioning brake-lights or similar equipment. *See Heien v. North Carolina*, 135 S. Ct. 530, 540 (2014). And unlike walking, the activity of driving is subject to exacting regulations concerning speed, direction of movement, signaling before turning, and waiting at

red lights—even if there is no oncoming traffic that presents any safety concern. Simply put, driving is one of the most pervasively regulated activities in which most people will ever engage.

Like all driving regulations, implied consent statutes are directly linked to the critical goal of preserving roadway safety. States therefore can require that, as a condition of driving, people give their implied consent to chemical testing when the police have probable cause for an impaired driving offense. *See Birchfield*, 136 S. Ct. at 2185–86 (recognizing the ongoing validity of such laws). Given that most suspects receive a polite reminder that refusal will result in sanctions, the voluntariness of a person's submission to testing is best understood to lie not in their interactions with the police, but rather in the conduct that occurs shortly before those interactions—the wholly voluntary act of driving.

B. An unconscious driver's statutory consent remains valid unless revoked.

Consent to a search "may be withdrawn or limited at any time prior to the completion of the search." 4 W. LaFave, Search and Seizure § 8.1(c) & n.171 (5th ed.) (collecting cases). This rule applies with implied consent laws: in *McNeeley* the driver withdrew statutory consent by refusing to cooperate with voluntary testing, so unless there existed some other exception to the warrant requirement—such as exigent circumstances, as measured by the totality of the circumstances—the police needed to obtain a warrant. *McNeeley*, 569 U.S. at 145–46, 148–56.

The rule applies with drivers who are unconscious. Implied consent requires no affirmative act to remain in place; rather it remains in place until it is withdrawn. An unconscious driver has taken no affirmative act to withdraw their consent, therefore the implied consent remains in place. As a court in one State noted regarding a blood draw of an unconscious driver: "Sims impliedly consented to be tested for alcohol by driving a motor vehicle in Idaho. . . . His alleged unconsciousness does not effectively operate as a withdrawal of his consent." *Sims v. State*, 358 P.3d 810, 817–18 (Idaho Ct. App. 2015).

That view is consistent with this Court's holding in *Birchfield*: there the Court only imposed a limit on what consequences States can impose for withdrawing statutory consent when under investigation, it did not undermine the fundamental principle that statutory consent remains valid until it has been withdrawn. The Court said, "[t]here must be a limit to the *consequences* to which motorists may be deemed to have consented by virtue of a decision to drive on public roads"—and drew the line at the consequence of separate criminal sanctions for a driver's non-cooperation at the scene. *Birchfield*, 136 S. Ct. at 2185 (emphasis added). But in the immediately preceding passage the Court emphasized it was not disturbing the consistent approval of implied consent laws themselves, and that "nothing we say here should be read to cast doubt on them." *Id.* So in the unconscious driver context, statutory consent should be recognized as ongoing, unless withdrawn before a search occurs.

Sometimes, a driver will withdraw statutory consent while interacting with police, before falling

unconscious. Other times, an unconscious driver might become alert before blood is drawn, and at that point withdraw statutory consent. In either of those scenarios, the police should not be allowed to proceed with a warrantless blood draw. But if the sometimes-alert driver does not at any point withdraw statutory consent, the consent remains valid. Likewise, if the driver is unconscious from the outset, statutory consent simply has not been withdrawn. Particularly in States with unconscious driver provisions, it is reasonable for officers to understand that the person's statutory consent remains in effect, despite being unconscious. *See Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (defining the scope of consent by what a reasonable person would understand). And the fact that the person, while unconscious, is unable to withdraw their statutory consent should not alter the analysis. After all, the police can conduct a consensual search of an arrestee's home—based on consent the arrestee conveyed at the jail—without bringing the arrestee with them to give him an ongoing opportunity to interpose an objection. *See, e.g., United States v. Pikyavit*, 527 F.3d 1126, 1128 (10th Cir. 2008) (arrestee's consent impliedly conveyed that officers could still enter his home, even though they found the doors were locked).

Once a person gives consent, statutory or otherwise, the police are under no constitutional obligation to ensure that the person *still* wants to consent—they can proceed with a search.

II. A State's interests in warrantless blood draws outweigh those of the driver when the driver is unconscious.

The touchstone of analysis under the Fourth Amendment is reasonableness. *United States v. Knights*, 534 U.S. 112, 118–19 (2001). The reasonableness of a search is determined by "assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). *See also Birchfield*, 136 S. Ct. at 2179–80 (balancing public and private interests to assess whether breath tests and blood tests of impaired drivers are valid as searches incident to arrest).

Balancing public and private interests favors allowing the searches at issue here.

A. With blood draws from unconscious drivers, the public interests are higher.

This Court has repeatedly acknowledged the States' strong interest in obtaining blood or breath samples from impaired driving suspects—in a timely manner, before the evidence of the driver's intoxication naturally dissipates—as part of the States' efforts to keep our public highways safe. *See Birchfield*, 136 S. Ct. at 2166–70; *McNeeley*, 569 U.S. at 1559–61 (plurality opinion); *Neville*, 459 U.S. at 558–59; *Mackey*, 443 U.S. at 17–18; *Schmerber v. California*, 384 U.S. 757, 770–71 (1966). That important public interest need not be detailed again

here. But in the specific context of unconscious drivers, several points must be made.

First, cases with unconscious drivers typically involve an accident. This is readily gleaned from the available statistics: in a recent year, there were 10,874 alcohol-impaired driving fatalities, and 61% of those killed were the drunk drivers themselves; it is logical to infer that in the remaining cases there were a significant number where the prosecuted drunk drivers were sufficiently injured as to be rendered unconscious.[1] Also, every year there are hundreds of thousands of non-fatal alcohol-related crashes involving injuries, and those incidents likely make up many of the cases in which the impaired drivers were sufficiently injured as to become unconscious.[2] Unsurprisingly, a number of the States with unconscious driver provisions specifically contemplate warrantless blood draws in cases involving death or injury to victims.[3] Unlike the record in *Birchfield* which did not address the frequency of unconscious drivers, the experience of Amici States and the statistics above indicate that unconscious drivers arise with unfortunate frequency. Cases of this type

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[1] NHTSA, Traffic Safety Facts, 2017 Data, Alcohol-Impaired Driving 2 (No. 812630, Nov. 2018). Of course, there are a far larger number of non-fatal alcohol-related crashes, and a correspondingly large number of those incidents likely involve suspects who were rendered unconscious.

[2] NHTSA, The Economic and Societal Impact Of Motor Vehicle Crashes, 2010 (Revised) 3, 158 (No. 812013, May 2015).

[3] *See* Appendix.

are common;[4] 29 states have statutes addressing blood draws from unconscious drivers suspected of drunk driving, suggesting the magnitude of the problem.[5]

Second, with unconscious drivers, less intrusive means of testing are unavailable. As *Birchfield* recognized, breath tests cannot be administered to unconscious persons. *Birchfield*, 136 S. Ct. at 2184. And the usual way of eliciting cooperation at the

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[4] Treatises devote entire sections to the topic of unconscious drivers suspected of drunk driving, aggregating dozens of cases in the process. *See, e.g.*, Patricia C. Kussman, What Constitutes Driving, Operating, or Being in Control of Motor Vehicle for Purposes of Driving While Intoxicated Statute, Regulation, or Ordinance - Being in Physical Control or Actual Physical Control - Motorist Sleeping or Unconscious, 93 A.L.R. 6th 207, §§ 14-31 (2014) (collecting cases); 1 Flem K. Whited III, *Drinking/Driving Litigation: Criminal and Civil* §7.6 (2d ed. 2016) (same).

[5] *See* Appendix, discussing Ala. Code § 32-5-192(b); Alaska Stat. § 28.35.035(b); Ariz. Rev. Stat. Ann. § 28-1321C; Ark. Code Ann. § 5-65-202(b); Cal. Veh. Code § 23612(a)(5); Colo. Rev. Stat. § 42-4-1301.1(8); Fla. Stat. § 316.1932(1)(c); Ga. Code Ann. § 40-5-55(b); 625 Ill. Comp. Stat. 5/11-501.1(b); Iowa Code § 321J.7; Ky. Rev. Stat. Ann. § 189A.103(2); La. Rev. Stat. Ann. § 32:661B; Md. Code Ann., Cts & Jud. Proc. § 10-305(c); Mo. Rev. Stat. § 577.033; Mont. Code. Ann. § 61-8-402(3); Nev. Rev. Stat. § 484C.160; N.H. Rev. Stat. Ann. § 265-A:13; N.M. Stat. Ann. § 66-8-108; N.C. Gen. Stat. § 20-16.2(b); Ohio Rev. Code Ann. § 4511.191(4); Okla. Stat. tit. 47, §751; Or. Rev. Stat. § 813.140; S.C. Code Ann. § 56-5-2950(H); Tex. Transp. Code Ann. § 724.014 (West); Utah Code Ann. § 41-6a-522; Vt. Stat. Ann. tit. 23, § 1202(a)(2); W. Va. Code, § 17C-5-7(a); Wis. Stat. § 343.305(3)(b); Wyo. Stat. Ann. 1977 § 31-6-102(c). Note that this number does not include those states that have also explicitly acknowledged the problem, but impose additional requirements prior to drawing blood from such unconscious individuals. *See, e.g.*, Tenn. Code Ann. § 55-10-406(i).

scene—a conversation about the implied consent statute—is unavailable. That conversation ordinarily is one of the "broad range of legal tools" available to secure BAC evidence. *McNeely*, 569 U.S. at 160–161 (recognizing the permissible "significant consequences" that flow from a motorist withdrawing consent). That "tool" is unavailable here as a means of conducting warrantless testing, because an unconscious suspect is unable to hear and respond to an officer's explanations. Particularly given the rapid dissipation of alcohol within the blood, discussed below, a blood test based on statutory consent is the least intrusive and most expeditious means of obtaining this information in these particular circumstances.

Third, with unconscious drivers, obtaining a warrant takes more time. The police cannot be expected to begin drafting a search warrant affidavit before they develop probable cause. With unconscious drivers, it often takes longer to develop probable cause, because the police cannot interact with the driver; they will typically not detect slurred speech, hear an admission to drinking, or observe that the driver's balance is unsteady. Until the police collect sometimes conflicting statements from eyewitnesses, they often have no information about whether an unconscious motorist was even driving poorly. At the scene of a collision, it often takes time to determine whether the unconscious driver caused the accident, let alone detect that the driver consumed alcohol. *See, e.g.*, *People v. Schaufele*, 325 P.3d 1060, 1062—63 (Colo. 2014) (plurality opinion) (police did not develop probable cause until they smelled alcohol on driver at

hospital, as his incoherence at the scene could have been due to either intoxication or a head injury); *see also Commonwealth v. March*, 154 A.3d 803 (Pa. Super. Ct. 2017), *rev'd*, *Commonwealth v. March*, 172 A.3d 582 (Pa. 2017) (police developed probable cause only after speaking with accident witnesses, finding paper bag in car, and field testing powder found in bag).[6]

And in addition to slow-developing probable cause, there is another reason warrants in this context take time: the warrant application process itself typically is slower. Articulating why the officer perceives a suspect's lethargic statements to be more like intoxication, rather than the incoherent ramblings of a sober person who has been hit by an airbag, takes time. Explaining why the officer credits the perceptions of one eyewitness rather than another, regarding who was at fault in an accident, also takes time. Unlike run-of-the-mill DUIs, in which officers can use "standard-form warrant applications" to "streamline the warrant process," *see McNeeley*, 569 U.S. at 155, the probable cause statement in these cases must be created from scratch—and be detailed. *See Illinois v. Gates*, 462 U.S. 213, 239 (1983) ("Sufficient information must be presented to the magistrate to allow that official to determine probable

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[6] Even if officers immediately smell alcohol on an unconscious driver at the scene, without witness statements about a person's driving, the mere presence of an odor of alcohol on the person will not establish probable cause. *See, e.g.*, *State v. Kliphouse*, 771 So.2d 16, 22–23 (Fla. Dist. Ct. App. 2004); *People v. Roybal*, 655 P.2d 410, 413 (Colo. 1982).

cause; his action cannot be a mere ratification of the bare conclusions of others.") Setting aside the fact that many States *require* search warrant applications to be in writing, *see, e.g.*, Colo. Const. Art. II § 7; Mo. Ann. Stat. § 542.276.2(1); *see also* 2 W. LaFave, Search and Seizure § 4.3(b) nn.16–17 (5th ed.), the detailed description of probable cause in these cases would often necessitate a written affidavit. The warrant process itself in such cases therefore takes time.[7]

The public interests favoring warrantless blood draws from unconscious, impaired drivers therefore are strong.

B. With blood draws from unconscious drivers, the private interests are lower.

This Court long ago recognized that blood testing procedures have "become routine in our everyday life." *Breithaupt*, 352 U.S. at 436. Extraction of blood samples for testing remains "commonplace in these days of periodic physical examination," and "for most people the procedure involves virtually no risk, trauma, or pain." *Schmerber*, 384 U.S. at 771. A blood draw in a medical setting by trained personnel is far less intrusive than the types of bodily invasions this Court has found unreasonable. *See Winston v. Lee*, 470 U.S. 753, 759–66 (1985) (chest surgery to remove bullet violated Fourth Amendment where it was

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[7] While warrantless blood draws in some of these cases might ultimately be upheld under an exigent circumstances theory, the case-by-case, uncertain nature of that inquiry prompts some officers to seek warrants anyway, with resulting delay and the loss of critical evidence.

unnecessary to prove the prosecution's case); *Rochin v. California*, 342 U.S. 165, 172–74 (1952) (stomach pumping to extract narcotics through vomiting violated due process, as it was "brutal" and "offensive to human dignity"). While for many the process of having blood drawn "is not one they relish," it "involves little pain or risk." *Birchfield*, 136 S. Ct. at 2178.

Nonetheless, any compelled intrusion of the human body implicates constitutionally protected privacy interests, *McNeeley*, 569 U.S. at 159 (plurality opinion), and blood draws implicate greater intrusions on a person than breath tests. *Birchfield*, 136 S. Ct. at 2178. But when an impaired driving suspect is unconscious, the analysis of the suspect's interest must be altered.

First, despite the existence of probable cause, some impaired driving suspects—perhaps especially those who are unconscious due to an accident—will be shown, by a timely blood sample, to be innocent. All that is required for probable cause is a "fair probability" that evidence of a crime will be found in a particular place. *Gates*, 462 U.S. at 235, 238. Whether probable cause is determined by a police officer on the scene, or by a magistrate issuing a warrant, there will be cases where blood is drawn based on probable cause, but subsequent testing shows that the person's blood alcohol content was within the legal limit. When this occurs, the person could not even be charged; instead, if there was a multi-car collision, it might be that the *other* driver gets charged, based on testing of *that* person's sample. Timing is critical, because the practice of extrapolating a theoretical earlier BAC

from a sample taken after the act of driving is imprecise. Alcohol dissipation rates vary based on a person's weight, gender, and alcohol tolerance, as well as the circumstances in which alcohol was consumed.[8] Some say the "typical" rate is from 0.015 to 0.02 percent per hour, while others say it is from 0.01 to 0.025 percent per hour.[9] So a person with a 0.03 BAC two hours later might have been driving with a 0.05 BAC—*within the lego! limit*—or a 0.08 BAC, by definition guilty. Since obtaining a warrant in unconscious driver cases takes time, warrantless blood draws will clear some entirely from suspicion, and will help others avoid wrongful convictions.

Second, with unconscious drivers, a blood draw typically causes no pain, anxiety, embarrassment, or even inconvenience. There is no inconvenience because—even if the incident does not involve a collision—an unconscious driver will almost certainly be taken for medical clearance, and therefore will already be encountering medical personnel. There also is no embarrassment in having blood drawn. In *Birchfield* this Court upheld criminal sanctions for those refusing to a take a breath test, in part because breath tests are not "inherently embarrassing;" it likewise will not be embarrassing for an unconscious person, who is already in the presence of medical

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[8] *See McNeeley*, 569 US. at 152 (plurality opinion).

[9] *See McNeeley*, 569 US. at 152 (discussing typical hourly dissipation rate of 0.015 to 0.02 percent, based on expert's testimony); *cf. id.* at 169 (Roberts, C.J., concurring and dissenting) (discussing typical hourly dissipation rate of 0.01 to 0.025 percent, based on chemistry textbook).

personnel, to undergo a blood draw. And Petitioner appears to concede that the unconscious driver will not experience pain or anxiety. Pet. Br. 38. Petitioner argues instead that the person's mental sensations are not what make a warrantless blood draw significant, *id.*, but this Court has suggested otherwise. In *Birchfield*, one of the reasons this Court deemed blood draws to implicate greater private interests than breath tests was that, for many people, the blood draw process "is not one they relish." 136 S. Ct. at 2178.

To be sure, this Court was also concerned in *Birchfield* that some could feel anxiety about blood testing because it "places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC testing." *Id.* But that concern will not be present at the time of the procedure, if the driver is unconscious. And while the driver *later* will become aware that law enforcement has the sample, and might develop anxiety of this sort then, that post-procedure anxiety will be no greater than it would be if the police had obtained the sample after securing a warrant. To the extent the Court is concerned that, "[e]ven if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested," *id.*, there will always be a theoretical possibility that some hypothetical officer might engage in rogue testing. If the Court is concerned with that prospect, and believes the authority of a search warrant would help protect against it, there is a straightforward solution: uphold warrantless blood draws from unconscious

drivers so that the blood sample can be timely obtained, but require the police to secure a post-blood-draw search warrant prior to any testing. The Amici States do not believe such a search warrant is constitutionally required—since "implied consent" constitutes consent to the entire BAC testing process—but it would be one way of addressing this particular concern.

Finally, whether they cause an accident or not, drivers who are sufficiently impaired as to end up unconscious are among the very most dangerous drivers on the road. They should not be placed in a better position than conscious drivers. This Court has upheld the States' ability to compel conscious drivers to cooperate with testing, through the sanctions of administrative license revocation and the admission in evidence, in a criminal trial, of the driver's statement of refusal. *Mackey*, 443 U.S. at 10–19; *Neville*, 459 U.S. at 558–66. It would be counterintuitive at best if the drivers who are most dangerous—those who become unconscious—were able to not only avoid those sanctions but also evade entirely the production of a timely sample for testing, based on implied consent.

CONCLUSION

For these reasons, the judgment of the Wisconsin Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX

Survey of Unconscious Driver and Victim Injury or Death Provisions

State	Victim Injury or Death Provision	Unconscious Driver Provision
AL	—	"Any person who is dead, unconscious or who is otherwise in a condition rendering him incapable of refusal, shall be deemed not to have withdrawn the consent ... and the test or tests may be administered ..." ALA. CODE § 32-5-192(b) (2018)
AK	"If ... arrest results from an accident that causes death or physical injury to another person, a chemical test may be administered without the consent of the person arrested." ALASKA STAT. § 28.35.035(a) (2018)	"A person who is unconscious or otherwise in a condition rendering that person incapable of refusal is considered not to have withdrawn the consent ... and a chemical test may be administered ..." ALASKA STAT. § 28.35.035(b) (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
AZ	—	"A person who is dead, unconscious or otherwise in a condition rendering the person incapable of refusal is deemed not to have withdrawn the consent ..." ARIZ. REV. STAT. ANN. § 28-1321(C) (2019)
AR	—	"A person who is dead, unconscious, or otherwise in a condition rendering him or her incapable of refusal is deemed not to have withdrawn the consent ... and ... chemical tests may be administered ..." ARK. CODE ANN. § 5-65-202(b) (2019)

State	Victim Injury or Death Provision	Unconscious Driver Provision
CA	—	"A person who is unconscious or otherwise in a condition rendering him or her incapable of refusal is deemed not to have withdrawn his or her consent and a test or tests may be administered .... A person who is dead is deemed not to have withdrawn his or her consent and a test or tests may be administered at the direction of a peace officer." CAL. VEH. CODE § 23612(a)(5) (2019)

State	Victim Injury or Death Provision	Unconscious Driver Provision
CO	—	"Any person who is dead or unconscious shall be tested to determine the alcohol or drug content of the person's blood or any drug content within such person's system .... If a test cannot be administered to a person who is unconscious, hospitalized, or undergoing medical treatment because the test would endanger the person's life or health, the law enforcement agency shall be allowed to test any blood, urine, or saliva that was obtained and not utilized by a health care provider .... Any person who is dead, in addition to the tests prescribed, shall also have the person's blood checked for carbon monoxide content and for the presence of drugs ..." COLO. REV. STAT. § 42-4-1301.1(8) (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
FL	—	"Any person who is incapable of refusal by reason of unconsciousness or other mental or physical condition is deemed not to have withdrawn his or her consent to such test." FLA. STAT. ANN. § 316.1932(1)(c) (2018)
GA	"[A]ny person who operates a motor vehicle upon the highways or elsewhere throughout this state shall be deemed to have given consent ... to a chemical test ... if such person is involved in any traffic accident resulting in serious injuries or fatalities." GA. CODE ANN. § 40-5-55(a) (2019)	"Any person who is dead, unconscious, or otherwise in a condition rendering such person incapable of refusal shall be deemed not to have withdrawn the consent provided ... and the test or tests may be administered ... " GA CODE ANN. § 40-5-55(b) (2019)

State	Victim Injury or Death Provision	Unconscious Driver Provision
IL	"Any person ... involved in a personal injury or fatal motor vehicle accident, shall be deemed to have given consent ... to a chemical test or tests of blood, breath, other bodily substance ..." 625 ILL. COMP. STAT. ANN. 5/11-501.1(a) (2018)	"Any person who is dead, unconscious, or who is otherwise in a condition rendering the person incapable of refusal, shall be deemed not to have withdrawn the consent provided ... and the test or tests may be administered ..." 625 ILL. COMP. STAT. ANN. 5/11-501.1(b) (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
IA	"A person who operates a motor vehicle ... under circumstances which give reasonable grounds to believe that the person has been operating a motor vehicle [while intoxicated] ... is deemed to have given consent to the withdrawal of specimens of the person's blood ... if ... the person has been involved in a motor vehicle accident or collision resulting in personal injury or death." IOWA CODE ANN. § 321J.6(1) (2019)	"A person who is dead, unconscious, or otherwise in a condition rendering the person incapable of consent or refusal is deemed not to have withdrawn the consent provided ... and the test may be given ..." IOWA CODE ANN. § 321J.7 (2019)

State	Victim Injury or Death Provision	Unconscious Driver Provision
KY	—	"Any person who is dead, unconscious, or otherwise in a condition rendering him or her incapable of refusal is deemed not to have withdrawn the consent provided ... and the test may be given." KY. REV. STAT. ANN. § 189A.103(2) (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
LA	"The operator of any motor vehicle ... involved in a collision ... in which a fatality occurs shall be deemed to have given consent to, and shall be administered, a chemical test or tests of his blood, urine, or other bodily substance for ... determining the presence of any ... impairing substance." LA. REV. STAT. ANN. § 32:661(A) (2018)	"Any person who is dead, unconscious or otherwise in a condition rendering him incapable of refusal shall be deemed not to have withdrawn the consent provided ... and the test or tests may be administered ..." LA. REV. STAT. ANN. § 32:661(B) (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
MD	—	"[T]he type of test administered shall be ... [a] test of blood if: ... [t]he defendant is unconscious or otherwise incapable of refusing to take a test to determine alcohol concentration .... Any person who is dead, unconscious, or otherwise in a condition rendering him incapable of test refusal shall be deemed not to have withdrawn consent." MD. CODE ANN., CTS. & JUD. PROC. § 10-305(a)(1)(i),(c) (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
MO	"Any person who operates a vehicle upon the public highways of this state ... shall be deemed to have given consent ... [i]f the person, while operating a vehicle, has been involved in a collision or accident which resulted in a fatality or a readily apparent serious physical injury." MO. ANN. STAT. § 577.020(1); § 577.020(1)(6) (2018)	"Any person who is dead, unconscious or who is otherwise in a condition rendering him incapable of refusing to take a test as provided ... shall be deemed not to have withdrawn the consent provided ... and the test or tests may be administered." MO. ANN. STAT. § 577.033 (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
MT	A blood test "must be administered ... when ... the officer has probable cause to believe that the person was driving ... a vehicle ... involved in a motor vehicle accident or collision resulting in serious bodily injury." MONT. CODE ANN. § 61-8-402(2)(a) (2019)	"A person who is unconscious or who is otherwise in a condition rendering the person incapable of refusal is considered not to have withdrawn the consent provided ..." MONT. CODE ANN. § 61-8-402(3) (2019)
NV	—	"If the person to be tested ... is dead or unconscious, the officer shall direct that samples of blood from the person to be tested." NEV. REV. STAT. ANN. § 484C.160(3) (2019)

State	Victim Injury or Death Provision	Unconscious Driver Provision
NH	—	"Any person who is dead, unconscious, or who is otherwise in a condition rendering him or her incapable of refusing shall be deemed not to have withdrawn the consent provided ... and the test or tests may be administered." N.H. REV. STAT. ANN. § 265-A:13 (2018)
NM	—	"Any person who is dead, unconscious or otherwise in a condition rendering him incapable of refusal, shall be deemed not to have withdrawn the consent provided ... and the test or tests designated by the law enforcement officer may be administered." N.M. STAT. ANN. § 66-8-108 (2019)

State	Victim Injury or Death Provision	Unconscious Driver Provision
NC	—	"If a law enforcement officer has reasonable grounds to believe that a person has committed an implied-consent offense, and the person is unconscious or otherwise in a condition that makes the person incapable of refusal, the law enforcement officer may direct the taking of a blood sample or may direct the administration of any other chemical analysis that may be effectively performed." N.C. GEN. STAT. ANN. § 20-16.2(b) (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
OH	—	"Any person who is dead or unconscious, or who otherwise is in a condition rendering the person incapable of refusal, shall be deemed to have consented as provided ... and the test or tests may be administered ... " OHIO REV. CODE ANN. § 4511.191(A)(4) (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
OK	—	"Any person who is unconscious or otherwise incapable of refusing to submit to a test of such person's blood or breath to determine the alcohol concentration thereof, or to a test of such person's blood, saliva or urine to determine the presence or concentration of any other intoxicating substance therein, shall be deemed not to have withdrawn the consent provided ... and such test may be administered as provided herein." OKLA. STAT. ANN. TIT. 47, § 751(C) (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
OR	—	Sample may be drawn when "the police officer has probable cause to believe that the person was driving while under the influence of intoxicants and that evidence of the offense will be found in the person's blood or urine; and ... [t]he person is unconscious or otherwise in a condition rendering the person incapable of expressly consenting to the test or tests requested." OR. REV. STAT. ANN. § 813.140(2)(a),(b) (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
SC	—	"If the person is physically unable to provide an acceptable breath sample because the person has an injured mouth, is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel, the arresting officer may request a blood sample to be taken." S.C. CODE ANN. § 56-5-2950(A) (2018)
TX	—	"A person who is dead, unconscious, or otherwise incapable of refusal is considered not to have withdrawn the consent provided ..." TEX. TRANSP. CODE ANN. § 724.014(a) (2017)

State	Victim Injury or Death Provision	Unconscious Driver Provision
UT	—	"[A] person who is dead, unconscious, or in any other condition rendering the person incapable of refusal to submit to any chemical test or tests is considered to not have withdrawn the consent provided ... and the test or tests may be administered whether the person has been arrested or not." UTAH CODE ANN. § 41-6a-522 (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
VT	"Fatal collision or incident resulting in serious bodily injury. The evidentiary test shall also be required if the person is the surviving operator of a motor vehicle involved in a fatal incident or collision or an incident or collision resulting in serious bodily injury and the law enforcement officer has reasonable grounds to believe that the person has any amount of alcohol or other drug in his or her system." 23 VT. STAT. ANN. TIT. 23, § 1202(a)(4) (2018)	"If in the officer's opinion the person is incapable of decision or unconscious or dead, it is deemed that the person's consent is given and a sample of blood shall be taken." 23 VT. STAT. ANN. TIT. 23, § 1202(a)(2) (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
W VA	—	"Any person who is unconscious or who is otherwise in a condition rendering him or her incapable of refusal shall be considered not to have withdrawn his or her consent for a test of his or her blood or breath as provided ... and the test may be administered ..." W. VA. CODE ANN. § 17C-5-7(a) (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
WI	"If a person is the operator of a vehicle that is involved in an accident that causes substantial bodily harm ... to any person, and a law enforcement officer detects any presence of alcohol, a controlled substance, a controlled substance analog or other drug, or a combination thereof, the law enforcement officer may request the operator to provide one or more samples of his or her ... blood ..." WIS. STAT. ANN. § 343.305(ar)1 (2018)	"A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection[.]" WIS. STAT. ANN. § 343.305(3)(b) (2018)

State	Victim Injury or Death Provision	Unconscious Driver Provision
WY	—	"Any person dead, unconscious or otherwise in a condition rendering him incapable of cooperating with the administration of the tests is deemed to have given his consent provided by ... this section and the tests may be administered ..." WYO. STAT. ANN. § 31-6-102(b) (2018)

No. 18-6210

IN THE

Supreme Court of the United States

GERALD P. MITCHELL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF THE DKT LIBERTY PROJECT, REASON FOUNDATION, AND THE DUE PROCESS INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are non-profit organizations dedicated to protecting individual liberties, and especially those liberties guaranteed by the Constitution of the United States, against all forms of government interference. *Amici* have a particular interest in this case. The Wisconsin Supreme Court's decision below, which imputed consent for a Fourth Amendment search through the state's implied consent law, poses a severe threat to individual liberty, generally, and specifically to Americans' Fourth Amendment right to be "secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV.

The DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. The Liberty Project is committed to defending privacy, guarding against government overreach, and promoting every American's right and responsibility to function as an autonomous and independent individual. The Liberty Project espouses vigilance against government overreach of all kinds, but especially with respect to restrictions on individual civil liberties. The Liberty Project has filed several briefs as *amicus curiae* with this Court on issues involving constitutional rights and civil liberties, including the

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[1] Blanket consents from both parties to the filing of *amicus* briefs have been filed with the Clerk. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

freedom from unreasonable searches and seizures under the Fourth Amendment.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason participates as *amicus curiae* in cases raising significant constitutional or legal issues.

The Due Process Institute is a bipartisan, nonprofit, public interest organization that works to honor, preserve, and restore principles of fairness in the criminal justice system. Formed in 2018, the Due Process Institute has already participated as an *amicus curiae* before this Court in cases presenting important criminal law issues, such as *Timbs v. Indiana*, No. 17-1091 (decided February 20, 2019), *United States v. Haymond*, No. 17-1672 (on writ of certiorari), and *Turner v. United States*, No. 18-106 (petition for writ of certiorari pending).

SUMMARY OF ARGUMENT

The warrant requirement provides an essential safeguard against the government's ability to invade Americans' most private spaces. When considering whether "to invade another's body in search of evidence of guilt," the "importance of informed, detached and deliberate determinations" is particularly "indisputable and great." *Schmerber v. California*, 384 U.S. 757, 770 (1966). Yet, Wisconsin has attempted to impute consent, by statute, to enter one of the most sacrosanct of private places: an individual's body.

After Petitioner was arrested on suspicion of drunk driving, while he was unconscious, and without a warrant, Wisconsin officials drew a sample of his blood based only on the consent he purportedly provided under the state's implied consent law. Based on that statute, the Wisconsin Supreme Court found the consent exception to the warrant requirement satisfied on the theory that Petitioner had agreed to a blood draw as a consequence of his decision to drive on the state's roadways. Allowing the government to deem, by statute, an individual to have voluntarily waived essential constitutional rights would provide the government with expansive authority to chip away at the Fourth Amendment, as well as a number of other rights.

It is beyond dispute that a blood draw involves a serious invasion of an individual's expectation of privacy. Individuals have a strong liberty interest in their bodily integrity. Yet, through a blood draw the government pierces an individual's skin and extracts a part of her body. Not only does such a search invade an individual's

body, it also places in the government's hands material—a person's blood—from which a vast array of personal medical and genetic information can be obtained. In part because of these privacy interests, this Court has declined to find that warrantless blood draws, as a categorical matter, satisfy the exigent circumstances and search incident to arrest exceptions to the warrant requirement.

Under this Court's precedent, the result should be the same with respect to the consent requirement. Whether consent is actual and voluntary requires an analysis of the totality of the circumstances. The rule endorsed by the Wisconsin Supreme Court below, however, permits the government to impute consent based entirely on the fact that a motorist has elected to drive on the state's roads. Not only does this categorical rule fail to analyze whether an individual *actually* consented to a search, it also is necessarily coercive.

Most importantly, affirming the decision below would supply the government with a straightforward means to undermine essential constitutional protections. In the Fourth Amendment context, the ability to deem certain actions as establishing voluntary consent would provide the government with an easy avenue to avoid the necessity of seeking a warrant. But the consequences of an affirmance would not necessarily be cabined to the Fourth Amendment. Most constitutional rights can be waived after a finding that an individual has voluntarily relinquished those rights. Thus, deeming certain actions as sufficient consent to waive a constitutional right could likewise undermine the right to counsel, the right against self-incrimination, the right

to a jury trial, and other critical protections. That result cannot be squared with the Constitution; allowing the government to erode protected individual rights and liberties simply through legislation is impermissible. The decision below must be reversed.

ARGUMENT

I. A Blood Draw Constitutes A Serious Invasion Of An Individual's Bodily Integrity And Expectation Of Privacy.

There is no doubt that the drawing of blood from an individual—which involves a physical intrusion into a person's body and under her skin—is a search governed by the Fourth Amendment. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016). It also cannot be gainsaid that the drawing of blood from an unwilling individual is a serious invasion of that person's privacy. Through a blood draw, the government pierces an individual's skin and "extract[s] a part of the subject's body." *Id.* at 2178. Not only does that sort of "invasion of bodily integrity implicate[] an individual's 'most personal and deep-rooted expectations of privacy,'" *Missouri v. McNeely*, 569 U.S. 141, 148 (2013) (quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985)), it also directly "places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC [blood alcohol concentration] reading," *Birchfield*, 136 S. Ct. at 2178. The possibility that state officials might use an individual's blood sample to unlock a substantial range of information about that person implicates severe privacy concerns that extend beyond the already significant invasion of the person's bodily integrity.

This Court has long emphasized, in a variety of contexts, that an individual's right to bodily integrity and autonomy is sacrosanct. "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891). When considering whether the government may compel a defendant to undergo surgery to recover possible evidence in the form of a bullet lodged in the defendant's body, this Court stressed that "compelled surgical intrusion into an individual's body for evidence . . . implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime." *Winston v. Lee*, 470 U.S. 753, 759 (1985).

Similarly, the "forcible injection of medication into a nonconsenting person's body," in an effort to make that person competent to stand trial, "represents a substantial interference with that person's liberty." *Washington v. Harper*, 494 U.S. 210, 229 (1990). And the Court has held that other forcible invasions of a person's bodily integrity likewise raise serious privacy concerns. *See, e.g., Rochin v. California*, 342 U.S. 165, 172 (1952) (forcible stomach pumping—"[i]llegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents"—to seek evidence "is bound to offend even hardened sensibilities"); *Parham v. J.R.*, 442 U.S. 584, 600 (1979).

It is these very heightened privacy interests in bodily integrity and autonomy that have led this Court to hold that warrantless blood tests do not fall, as a matter of course, within certain exceptions to the Fourth Amendment's warrant requirement. This Court has declined to find, for example, that the possibility that the alcohol in a suspect's blood will dissipate categorically constitutes an exigency permitting a warrantless blood draw. *McNeely*, 569 U.S. at 152-53. In *McNeely*, this Court acknowledged that in *some* cases, when obtaining a warrant is impractical, an exigency may exist allowing the government to conduct a warrantless blood test before the alcohol dissipates from an individual's blood stream. *Id.* at 153. Circumstances may arise, like those presented in *Schmerber*, where it takes an unusually long time to transport the defendant to a hospital or to investigate the scene of an accident, such that insufficient time remains to secure a warrant. *Id.* at 150-51 (discussing *Schmerber*, 384 U.S. at 758-59, 770). But in *McNeely* the Court pointedly declined to provide the government with an unrestricted ability to conduct warrantless blood tests and to invade an individual's bodily integrity and significant privacy interests in all cases under the exigent circumstances exception. *Id.* at 156 ("In short, while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically.").

Similarly, in *Birchfield*, this Court refused to hold that a warrantless blood draw is categorically permissible as a search incident to a person's arrest. 136 S. Ct. at 2185. As this Court explained, "[b]lood tests are

significantly more intrusive" than breath tests and there is "no satisfactory justification for demanding the more intrusive alternative" of a blood draw "without a warrant." *Id.* at 2184. In the infrequent circumstance in which a person is unconscious—and where authorities are therefore unable to resort to that less intrusive alternative—this Court concluded that "the police may apply for a warrant if need be." *Id.* at 2184-85.

Thus, this Court has carefully considered the unique privacy interests at stake when considering whether to apply the Fourth Amendment's warrant requirement to blood draws. A blood draw involves a direct invasion into the body of an individual. And it gives the government access to material from which that person's sensitive medical and genetic information could be extracted. Indeed, DNA technology is "one of the most significant scientific advancements of our era." *Maryland v. King*, 569 U.S. 435, 442 (2013). In many ways "[t]he full potential for use of genetic markers in medicine and science is still being explored." *Id.* The reality that a significant range of information can now be obtained from a blood sample—information which may have previously been unavailable to law enforcement—should weigh heavily in this Court's determination of the privacy interests at stake. *Cf. Riley v. California*, 573 U.S. 373, 393-97 (2014) (closely considering the extension of this Court's prior case law given the heightened privacy interests implicated by "digital data").

These circumstances must be acknowledged when determining whether a state can deem, as Wisconsin has attempted to do here, the act of driving on the state's roads imputed consent sufficient as a constitutional

matter to invite the state to conduct a warrantless blood draw. For the Fourth Amendment's "overriding function" is "to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber*, 384 U.S. at 767.

II. Statutorily Imputed Consent Is Not Constitutionally Sufficient Under This Court's Precedent.

This Court should reject Wisconsin's claim that it can impute consent sufficient to sustain a warrantless search merely from an individual's choice to drive on the state's roadways. "Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). Although an individual may voluntarily consent to a search in the absence of a warrant, "consent" premised only on the fact that an individual has elected to drive on the state's roads is not voluntary under this Court's precedent.

1. This Court's case law clearly establishes that, for Fourth Amendment purposes, consent must be *actual* consent in fact. The government must show, based on the "totality of all the circumstances," that an individual's "consent to a search *was in fact* 'voluntary,'" and was not "the product of duress or coercion, express or implied." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). Only by analyzing all of the circumstances can it "be ascertained whether in fact [consent] was voluntary or coerced" and can a court determine whether the "legitimate need for such searches" is appropriately balanced against the "equally important

requirement of assuring the absence of coercion." *Id.* at 227, 233.

Wisconsin's categorical imputation of consent, *in fact*, to a blood draw by every individual who drives on a state's roads is directly at odds with this Court's holding in *Schneckloth*. It elevates a single consideration—the fact that a person exercised his right to drive—as the sole determinative one. And it precludes an inquiry into the actual circumstances that evidence (or do not) an individual's consent.

What is more, conditioning the privilege of driving on a state's roads on such consent is inherently coercive, and therefore cannot be voluntary. Driving is an essential feature of many Americans' everyday lives. Indeed, it is critical to a person's liberty. Americans frequently must drive to attend work. They need to drive to visit family and friends. Many drive as a means to make a living. It therefore is difficult to believe that, when put to the choice, individuals would sacrifice their mobility and freedom to travel on the remote chance they might someday be faced with a warrantless blood draw. That individuals cannot be expected to sacrifice their freedom to drive makes plain why that choice is coercive—and why the consent the court below believed was conveyed by that choice was inherently coerced. "[N]o matter how subtly the coercion was applied," any consent resulting from coercion is "no more than a pretext for [an] unjustified police intrusion against which the Fourth Amendment is directed." *Id.* at 228.

Moreover, the right to travel is a constitutional right of its own. *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969), *overruled in part on other grounds by Edelman*

v. Jordan, 415 U.S. 651 (1974). The government cannot lawfully condition an individual's exercise of that right on that individual's agreement to forego essential Fourth Amendment protections. *Cf. Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013) ("[T]he unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them.").

2. In limited circumstances, this Court has suggested that consent for a search can be implied by an individual's actions. But this type of consent—which again is based on an individual's *actual* consent—is wholly distinguishable from the sort of imputed consent that Wisconsin seeks to have this Court bless here.

In *Florida v. Jardines*, this Court explained that an individual may, through his actions, imply a license for authorities to enter into an area. 569 U.S. 1, 8 (2013). But this Court in *Jardines* referred to the possibility of an implied license when asking whether the homeowner there had provided *actual* consent for officers to approach his home with a drug-sniffing dog, as part of the "customary invitation" one extends to others to visit the curtilage of his home. *Id.* at 9. Here, by contrast, Wisconsin's legislature has attempted to impute consent to all motorists on its roadways by the mere act of driving. And it can hardly be considered customary to assume that motorists consent to allowing the government to take a part of their bodies merely by driving on the state's roads.

In other cases, involving administrative inspections conducted in closely regulated industries, this Court has

determined that individuals may have a lesser expectation of privacy when they know they will be subject to such inspections. But those cases do not support the expansive conception of consent that the Wisconsin Supreme Court endorsed below. This Court has permitted warrantless searches of business premises in closely regulated industries on the understanding that "businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade." *Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973); *see also, e.g., Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (alcoholic beverage industry, although noting that the regulatory scheme there did not provide for forcible entry in absence of warrant, but only made it a criminal offense to refuse admission); *United States v. Biswell*, 406 U.S. 311 (1972) (regulation of trafficking in firearms).

Critically, however, these decisions rest not on a finding of consent, but on the commonsense recognition that, given the nature of a closely regulated business, an individual who chooses to engage in those economic pursuits "does so with the knowledge that his business records . . . will be subject to effective inspection." *Biswell*, 406 U.S. at 316. In that context, any privacy expectation is minimal. Therefore, this Court has explained that allowing warrantless administrative searches in those cases presented only a "limited threat[] to the [individual's] justifiable expectations of privacy." *Id.* The concurrence below correctly recognized this limitation on those cases' reasoning. J.A. at 39-41. And any claim that the regulation of the state's

roadways and drivers' licensing is a similarly pervasively regulated arena would directly conflict with this Court's automobile search case law: "Automobile or no automobile, there must be probable cause for the search." *Almeida-Sanchez*, 413 U.S. at 269.

3. Some states with an implied consent law, including Wisconsin, require the reading of a statement informing an individual of her opportunity to withdraw consent before a blood draw is performed (albeit at the pain of potential penalties). *See* J.A. at 30-32. Here, the Wisconsin Supreme Court found that Mr. Mitchell consented to the warrantless blood draw not only because of the initial consent implied by his decision to drive on Wisconsin's roadways, *id.* at 29-30, but also on the fact that he had forfeited his statutory opportunity to *withdraw* consent because he was unconscious, *id.* at 32. Even if a conscious person's decision not to withdraw statutorily imputed consent could be considered voluntary (which it cannot), at a bare minimum, consent cannot be considered "voluntary" when the individual whose blood will be obtained by the government is unconscious and thus unable to consider whether to withdraw it.

An individual who is unconscious certainly cannot be said to have consented because of the mere fact that he now lacks capacity to *withdraw* consent. Indeed, this Court has acknowledged that "where a person is unconscious or drugged or otherwise lacks capacity," any consent cannot even meet the minimal requirement of being "knowing" consent. *Schneckloth*, 412 U.S. at 224 (quotation marks omitted). A failure or inability to respond is the opposite of affirmative consent.

III. Allowing The Government To Impute Consent By Statute Would Establish A Significant End-Run Around Constitutional Protections.

Permitting the government to impute voluntary consent by statute would provide a ready means to override essential constitutional protections. For that reason, alone, this Court should reverse the decision below.

1. Allowing the government to deem, by simple legislation, its citizens to have consented to forego their constitutional protections results in a significant weakening of the Fourth Amendment's protections. Exceptions to the warrant requirement "have been jealously and carefully drawn." *Jones v. United States*, 357 U.S. 493, 499 (1958). This should be particularly so with respect to consent searches: Given the frequent reliance upon consent searches, the Fourth Amendment's protection against unreasonable searches naturally "widens or narrows, depending upon the difficult or ease with which the prosecution can establish such consent." 4 Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 8.1, at 8-9 (5th ed. 2012).

If the government could impute consent through statute, legislatures would wield significant power to satisfy the consent exception, and thereby bypass the Fourth Amendment's protections. Rather than be required to show that an individual actually provided consent to a search, the government could simply rest on its statute. Permitting a state to deem into existence the *facts* necessary to establish voluntary consent—and to negate an individual's right to be free from unreasonable

searches—is inconsistent with the Fourth Amendment's protections. *Accord People v. Arredondo*, 199 Cal. Rptr. 3d 563, 574 (Ct. App. 2016), *review granted by* 371 P.3d 240 (Cal. 2016). If the Supremacy Clause means anything, it surely means that state governments cannot erode the Constitution's protections by legislating factual presumptions that decisively control the application of their citizens' rights.

Permitting the government to impute consent sufficient to justify a warrantless search also could provide the government with an avenue to more easily enter other areas protected by the Fourth Amendment. For example, a legislature could attempt to impute consent to search a person's home or apartment through the person's choice to accept government mortgage assistance, housing subsidies, or other financial benefits. Yet, the "very core" of the Fourth Amendment protects "the right of a man to retreat into his home and there be free from unreasonable government intrusion." *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

Or, like the warrantless blood draw at issue in this case, the government might attempt to imply consent to search an individual's cell phone through the individual's decision to drive on the state's roadways, on the theory that it might provide evidence of texting while driving or other violations of the state's traffic laws. But this Court has explained that a cell phone "not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form." *Riley*, 573 U.S. at 396-97.

Worse still, allowing the government to legislate constitutional consent also would significantly weaken the *procedural* protections this Court has put in place to govern consent searches. When the government invokes the consent exception and seeks to introduce evidence that is the product of a warrantless search, it is the government that bears the burden of demonstrating that consent was voluntarily obtained. *See Bumper v. North Carolina*, 391 U.S. 543, 548 (1968) (The government must prove "that the consent was, in fact, freely and voluntarily given."). To permit the government to legislate that, categorically, every motorist who drives on the state's roads consents as a matter of law to a search would subvert this protection. It would obviate the state's burden to show that a particular individual, in fact, freely and voluntarily consented to a search.

2. Nor would the government's ability to significantly erode essential constitutional protections if the decision below is affirmed necessarily be limited to the Fourth Amendment context. Instead, permitting the government to impute voluntary consent, through a statutory presumption, would provide the government with a ready tool to curtail a number of other essential constitutional rights.

The question of whether an individual has voluntarily consented to relinquishing her constitutional rights is a common one whenever the government maintains that it may take action that might otherwise be barred by the Constitution. Criminal defendants, in particular, may "knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution."

United States v. Mezzanatto, 513 U.S. 196, 201 (1995); *see also Peretz v. United States*, 501 U.S. 923, 936 (1991) ("The most basic rights of criminal defendants are . . . subject to waiver.").

For example, defendants relinquish a number of constitutional rights when entering a guilty plea. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969). To affirm his guilt, a defendant waives his Fifth Amendment right to be free of compelled self-incrimination. *Id.* He also waives his right to a jury trial and his right to confront his accusers. *Id.* A criminal defendant can also waive any double jeopardy defense. *Ricketts v. Adamson*, 483 U.S. 1, 10 (1987). Because of the importance of these rights, a court accepting a guilty plea must determine that the defendant's "waiver of his constitutional rights is knowing and voluntary." *Godinez v. Moran*, 509 U.S. 389, 400 (1993). Just like the question of voluntariness under the Fourth Amendment's consent exception, to find that a plea is made voluntarily requires a determination that the defendant's decision "is uncoerced." *Id.* at 401 n.12; *see also McCarthy v. United States*, 394 U.S. 459, 466 (1969) ("[I]f a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void.").

In a criminal case, a defendant also has the ability to waive his Sixth Amendment right to counsel. But, again, to waive that right, a defendant must do so "knowingly and intelligently"—meaning that he "was voluntarily exercising his informed free will." *Faretta v. California*, 422 U.S. 806, 835 (1975).

In the context of a custodial interrogation, too, an individual enjoys a number of constitutional rights. An individual under questioning has the right to the presence of counsel and a right to be free from self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). These rights can only be waived if a decision to relinquish them "is made voluntarily, knowingly and intelligently." *Id.* To be voluntary, any waiver must be "the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

In each of these contexts, the essential question a court must ask is whether the defendant elected to waive or relinquish his constitutionally protected right *voluntarily*. This Court, appropriately, has consistently hesitated to infer a voluntary waiver of constitutional rights absent a clear indication. Courts should "indulge in every reasonable presumption against waiver," *Brewer v. Williams*, 430 U.S. 387, 404 (1977), and this Court does not "presume acquiescence in the loss of fundamental rights," *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (quotation marks omitted).

A decision affirming the Wisconsin Supreme Court, however, risks providing the government with the ability to erode each of these constitutional protections. If the government can impute voluntary consent by statute sufficient to satisfy the exception to the warrant requirement, presumably a statutory presumption that an individual consents by taking a particular action could likewise be used to demonstrate that an individual "voluntarily exercise[ed] his informed free will" to

relinquish other constitutional rights. *Faretta*, 422 U.S. at 835.

Consider the guilty plea of a defendant who does not understand English. To assertain the charges against him and his risks of proceeding to trial, the defendant might need the aid of an interpreter. *See, e.g.*, 28 U.S.C. § 1827(d)(1) (requiring the use of interpreters when a judicial officer determines it is necessary to ensure a "party's comprehension of the proceedings or communication with counsel or the presiding judicial officer"). A legislature could attempt, however, to deem by statute that a defendant knowingly and voluntarily agrees to the charges and facts contained in a plea agreement if the defendant had an interpreter available to him, but did not avail himself of those services. That choice, under the reasoning of the Wisconsin Supreme Court, could be sufficient to deem any guilty plea voluntary. *But see McCarthy*, 394 U.S. at 466 ("[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.").

The government could also attempt to undermine the important protections against self-incrimination and the presence of counsel during a custodial interrogation by deeming an individual to have voluntarily waived those rights if he chooses to avail himself of certain privileges—like making a telephone call—and otherwise chooses to converse with government officials. *But see Miranda*, 384 U.S. at 475-76 ("[W]here in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual

answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated.").

And, as in the Fourth Amendment context, any ability to impute certain choices as a voluntary waiver of constitutional rights would undermine the related procedural protections afforded to criminal defendants. Just like the consent requirement, "[t]his Court has always set high standards of proof for the waiver of constitutional rights." *Id.* at 475. But if the government could deem certain actions as evidencing the voluntary relinquishment of constitutional protections, the government's burden of proof would be easily satisfied.

These and other possibilities demonstrate why permitting the government to impute or deem consent, through legislation, would provide the government with a ready tool to undermine a number of critical individual rights guaranteed by the Constitution. Adopting the Wisconsin Supreme Court's reasoning would establish a significant loophole in the Constitution's protections.

3. To be sure, the scourge of drunk driving in this country is a pressing public policy concern. State and federal legislatures are right to be focused on solutions to that vexing challenge. Undermining important constitutional protections in order to serve that goal, however, is an ill-advised solution. "[I]llegitimate and unconstitutional practices get their first footing" through "silent approaches and slight deviations from legal modes of procedure"; that result can "only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed." *Boyd v. United States*, 116 U.S.

616, 635 (1886), *overruled on other grounds by Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967).

The warrant requirement is an important bulwark protecting individual liberty. "The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great." *Schmerber*, 384 U.S. at 770. Requiring the government to seek a warrant guarantees that "the inferences to support a search are 'drawn by a neutral and detached magistrate instead of being judged by the official engaged in the often competitive enterprise of ferreting out crime.'" *Riley*, 573 U.S. at 382 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)). A state should not be permitted to deem exceptions to the warrant requirement satisfied.

It also bears emphasis that reversing the Wisconsin Supreme Court's reliance on imputed consent here would not cast any doubt on the other avenues available to authorities—avenues that better safeguard individual liberty. Nothing would prevent authorities from invoking the exigency exception in appropriate circumstances to take a blood draw without a warrant. *See McNeely*, 569 U.S. at 153. *But see* J.A. at 12 (noting that in this case the state "expressly stated that it was not relying on exigent circumstances to justify the blood draw"). Authorities also may employ a breath test incident to arrest and apply civil and, where constitutional, criminal penalties when an individual refuses to consent to be searched. *See Birchfield*, 136 S. Ct. 2185-86. But what should not be permissible is allowing a legislature to impute, through legislation, a

presumption that an individual has relinquished his constitutional protections.

CONCLUSION

The judgment of the Wisconsin Supreme Court should be reversed.

March 4, 2019

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IN THE

Supreme Court of the United States

GERALD P. MITCHELL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Writ Of Certiorari To
The Supreme Court Of Wisconsin

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STATEMENT OF THE CASE AND FACTS[1]

Amicus DUI Defense Lawyers Association adopts the Statement of the Facts as laid out by Petitioner and believes it provides a short and concise summary of the facts and issues in this matter.

Amicus DUIDLA would highlight two salient but potentially overlooked facts: (1) Petitioner was arrested approximately one month after this Honorable Court's decision in *Missouri v. McNeely*, 569 U.S. 141 (2013), and (2) Petitioner's jury trial was held on December 17, 2013, and Petitioner was sentenced on February 28, 2014, prior to this Honorable Court's decision in *Birchfield v. North Dakota*, 136 S.Ct. 614 (2016).

INTEREST OF *AMICUS CURIAE* DUIDLA

The DUI Defense Lawyers Association ("DUIDLA") is a nonprofit national bar association comprised of lawyers throughout North America who endeavor to protect the constitutional rights of citizens accused of driving under the influence (DUI) and related charges and to ensure that such accused citizens receive a fair trial as guaranteed under United States Constitution.

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[1] The parties have consented to the filing of this *amicus* brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amicus curiae* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Amicus Curiae DUIDLA has a strong interest in the promulgation and enforcement of fair and constitutional DUI laws that create a safe society, but still protect the civil liberties of our populace. Its mission is to protect and ensure by rule of law those individual rights guaranteed by the state and federal constitutions in DUI-related cases, to resist the constant efforts that are made to curtail these rights, and to encourage cooperation between lawyers engaged in the furtherance of these objectives.

DUIDLA is concerned with the practical problems presented to law enforcement, judges, defense attorneys, and the general public, and works to prevent the erosion of all citizens' Fourth Amendment rights; erosion which tends to frequently occur in the context of DUI cases. This is especially true when a search implicates the integrity of the human body and all of the privacy and dignity concerns associated with it.

Laws like those at issue in this case critically undermine the very concept of "free and voluntary consent." They lead us down a slippery slope where legislatures (pressured by voters) and agents of the executive (concerned primarily with investigating and prosecuting crimes) become the branches of government that make determinations regarding whether or not a suspect has "consented" to a Fourth Amendment search.

Amicus Curiae DUIDLA, through its members' efforts in trial courts and through the organization's *amicus* efforts, seeks to ensure that the legislative and

executive branches of government do not usurp the role of the judiciary in defining the scope of what does and does not qualify as consent to search in a criminal investigation where, absent such consent, the search would violate the Fourth Amendment to the United States Constitution.

The DUIDLA is particularly interested in cases focusing on this Court's decision in *Birchfield*, of which DUIDLA was an *Amicus Curiae*. It is DUIDLA's belief that this Court ruled correctly in *Birchfield* and in *McNeely* with regard to warrantless blood draws.

Amicus DUIDLA believes that cases such as the instant case are, in large part, the result of state legislatures and state courts not having made changes to their statutes and interpretations thereof to reflect the holdings of this Court in *McNeely* and *Birchfield*.

Amicus DUIDLA submits this brief to help ensure that the rights outlined in *Birchfield* are protected and safeguarded and to urge this Court to send a clear message to the state legislatures that have been slow to heed the previous pronouncements of this Court regarding the Fourth Amendment and warrantless blood draws.

ARGUMENT

Warrantless searches "conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions." *Katz v. U.S.*, 389 U.S. 347, 357 (1967).

This Court has previously rejected the exceptions raised by the State in Petitioner's case to justify the warrantless blood draw of Petitioner while he was unconscious, therefore, it was *per se* unreasonable and Petitioner's blood test results are inadmissible.

This Court has consistently adhered to the Constitution's "require[ment] 'that the deliberate, impartial judgment of a judicial officer be interposed between the citizen and the police.' 'Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes.'" *Id.* (Citing *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963), *United States v. Jeffers*, 342 U.S. 48, 51 (1951)) (citations and punctuation omitted).

Despite this Court's consistent adherence to the provisions protecting the privacy interests of citizens under the Fourth Amendment, the government is once again urging this Court to abandon those principles by adopting a categorical exception to the Fourth Amendment.

Although this Court has previously rejected the precise arguments being made by the Respondent in the instant matter, the Respondent now contends that this Court's clear pronouncements in *McNeely* and *Birchfield* are not applicable to unconscious individuals when a state legislates a legal fiction - that an unconscious individual has waived his or her Fourth Amendment rights. Similarly, the government would argue that such legal fiction would apply to one who lacks the capacity to consent or decline to consent to such a search.

Thus, the government argues that the legislature has the authority to deny one of the most fundamental rights that our Constitution guarantees by declaring that an individual consented to an intrusive blood test by driving on the roads when, in fact, that individual had not consented to the search.

As discussed below, this Court considered this exact scenario in *Birchfield* and correctly analyzed the legal fiction of implied consent. This Court held that the government may not intrude on the privacy of citizens through a warrantless blood draw by enacting a statute that gives them the authority to do so through the fiction of "implied consent," and not actual, voluntary consent.

The rise in technological advances seen in recent years has been accompanied by a rise in governmental intrusions into the most private areas of a citizen's life. Those areas that are protected under the constitutional provisions that were drafted by our Framers have fallen under attack by state governments seeking to expand their authority over

the individual. State governments are forgetting that our Constitution and Bill of Rights were drafted by men who had first-hand experience of the dangers that a tyrannical government posed upon its citizens. The Framers sought to protect citizens from unreasonable encroachments on the most personal of civil liberties by preserving them in this nation's Constitution, and it is essential that the Court continue to adhere to those strict precedents by protecting unconscious suspects from intrusive searches of the individual's body through warrantless blood draws.

The vigilance this Honorable Court, and all those who venerate our Constitution, must adhere to was aptly described by another court:

> The [Fourth and Fifth Amendments] appear in the fundamental law of every state of this Union, as well as in the federal Constitution. They are the sacred civil jewels which have come down to us from an English ancestry, forced from the unwilling hand of tyranny by the apostles of personal liberty and personal security. They are hallowed by the blood of a thousand struggles, and were stored away for safe-keeping in the casket of the Constitution. It is infidelity to forget them; it is sacrilege to disregard them; it is despotic to trample upon them. They are given as a sacred trust into the keeping of the courts, who should with sleepless vigilance guard these priceless

> gifts of a free government. We hear and read much of the lawlessness of the people. One of the most dangerous manifestations of this evil is the lawlessness of the ministers of the law. This court knows and fully appreciates the delicate and difficult task of those who are charged with the duty of detecting crime and apprehending criminals, and it will uphold them in the most vigilant, legal discharge of their duties; but it utterly repudiates the doctrine that these important duties cannot be successfully performed without the use of illegal and despotic measures. It is not true that in the effort to detect crime and to punish the criminal "the end justifies the means." This is especially not true when the means adopted are violative of the very essence of constitutional free government. Neither the liberty of the citizen nor the sanctity of his home should be invaded without legal warrant.

Underwood v. State, 78 S.E. 1103, 1106 (Ga. App. 1913).

Most importantly, there is not even a practical need for this Court to retreat from its pronouncements in *McNeely* and *Birchfield*. Indeed, to do so is likely to only muddy the waters, cause more confusion, and engender further litigation, all of which will lead to more individuals who legitimately should be convicted

of DUI and related vehicular injury or death charges escaping punishment.

In the instant case the officers first sought a breath test and, realizing that the accused lacked the physical and/or mental capacity to cooperate with the breath testing procedure, decided to go to the hospital with the intention of invoking the "implied consent" provisions of the Wisconsin statute rather than take any action to seek a warrant.

There can be little doubt, given the information possessed by the officers at the time they decided to go to the hospital, that had the officers sought a warrant, as commanded by *McNeely,* they would have either obtained a warrant and a constitutionally valid blood draw, or, if they legitimately attempted to obtain a warrant and were unable to do so, they would have then been able to obtain a blood draw that would have been constitutionally valid under the "exigent circumstances" exception long recognized by this Court and discussed in detail in *McNeely.*

Thus, the primary problem in this case and many other cases involving warrantless blood draws is that some state legislatures and, to an extent, some state courts, have been slow to acknowledge or accept this Court's clear pronouncements in *McNeely* and *Birchfield* and as a result, law enforcement officers (just like the officer in *McNeely* and the officers in this case), have felt free to ignore the mandates of this Court to apply for a warrant.

The solution to the problem is not to retreat from the holdings in *McNeely* and *Birchfield.*

Similarly, the solution to the problem is not to just legislatively manufacture and assign to all driving citizens a fictitious consent.

The solution to the problem is to forcefully and unanimously reiterate the basic pronouncements in *McNeely* and *Birchfield* regarding the Fourth Amendment's warrant requirement. Therefore, this Honorable Court should render a decision in this case that makes it clear that this Honorable Court means what it has pronounced in *McNeely* and *Birchfield*.

I. RECENT DECISIONS OF THIS COURT HAVE CONSISTENTLY HELD THAT, ABSENT A RECOGNIZED EXCEPTION, WARRANTLESS BLOOD DRAWS ARE PROHIBITED BY THE FOURTH AMENDMENT.

A. The State's Arguments Directly Contradict This Court's Analysis, Sound Reasoning and Holdings in *Birchfield* and *McNeely*.

In *Birchfield v. North Dakota*, 136 S.Ct. 614 (2016), this Court was presented with numerous intertwined issues of warrantless blood draws and the right to refuse those intrusive searches during DUI investigations.

Contrary to the opinion of the Wisconsin Supreme Court below in the instant case, in *Birchfield*, this Court held, in no uncertain terms, that a warrantless blood draw does not fall within search incident to a lawful arrest (SILA) exception to the warrant requirement.

This Court in *Birchfield* did not suggest that its ruling might be different if the driver was unconscious, rather it specifically addressed the unconscious driver scenario and found:

> It is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries. But we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be.

Birchfield, 136 S. Ct. at 2184-85.

Certainly, in part, the *Birchfield* Court suggested that the search incident to a lawful arrest (SILA) exception was not applicable because there are less intrusive means, such as a breath test. But the Court also addressed situations where there were not alternative means and where the taking of blood might be preferable or necessary:

> In instances where blood tests might be preferable – e.g., where substances other than alcohol impair the driver's ability to operate a car safely, **or where the subject is unconscious—nothing prevents the police from seeking a warrant or from relying on the exigent circumstances exception if it applies.**

Birchfield, 136 S. Ct. at 2165 (emphasis added).

Petitioner has conceded that there were no exigent circumstances present in this case when the Petitioner's blood was drawn. *See State v. Mitchell*, 914 N.W.2d 151, 155 (Wisc. 2018) ("The State expressly stated that it was not relying on exigent circumstances to justify the blood draw.")

This Court's decision in *McNeely* expressly rejected the notion that the dissipation of alcohol from the bloodstream categorically supports a finding of exigent circumstances sufficient to authorize warrantless blood draws. *McNeely* further explained that "[i]n those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, **the Fourth Amendment mandates that they do so**." *Id.* at 1561 (emphasis added).

The reasoning of this Court in *McNeely* and *Birchfield* unequivocally required Officer Jaeger, the officer who arrested Petitioner, to obtain a warrant prior to taking a sample of Petitioner's blood. Officer Jaeger could have applied for a warrant but chose not to.

Moreover, Officer Jaeger observed several signs of Petitioner's intoxication prior to the unconsciousness which certainly would have provided him with the requisite probable cause to apply for a search warrant. Also notable, there were other officers present when Petitioner's consciousness began to fade, and any of those officers could have assisted and

expedited the process by transporting Petitioner to the hospital while Jaeger applied for the warrant.

This situation is on all fours with *McNeely*. "Consider, for example, a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer. **In such a circumstance, there would be no plausible justification for an exception to the warrant requirement.**" *McNeely*, 569 U.S. at 153-54 (emphasis added).

Additionally, Respondent appears to acknowledge *Birchfield*'s holding on this issue, when it stated that "subjecting a drunk driver to a breath test was lawful as a search incident to arrest, but **subjecting that suspect to a blood test was not lawful**..." *Respondent's Brief in Opposition*, page 19 (emphasis added).

Despite this acknowledgement, Respondent then proceeds to ignore *Birchfield* and invokes Wisconsin Supreme Court Justice Kelly's erroneous analysis, which essentially claims that the same exigent circumstances squarely rejected in *McNeely* (the dissipation of alcohol in the bloodstream alone) ought to be resurrected as a categorical exception here.

The only additional arguments that Respondent and Justice Kelly present to distinguish *McNeely* and *Birchfield* are that, in the instant case, "no less intrusive means were available to obtain the

evanescent evidence" and that it was unknown how long Petitioner might "remain unconscious." *Id.*

As discussed above, this Court already considered situations where blood would be the preferred or only means of testing available where drug-induced intoxication was suspected or where, like here, the driver was unconscious. And despite its *express* awareness of these scenarios, the Court still held that nothing prevents the police from seeking a warrant or from relying on the exigent circumstances exception if it applies. *Birchfield*, 136 S. Ct. at 2165.

Finally, it must be emphasized that the State has yet to provide any reasonable explanation as to why Officer Jaeger did not apply for a warrant. The length of time Petitioner would have been unconscious is irrelevant because, once a warrant was obtained, the officers could have legally drawn Petitioner's blood whether he was conscious or unconscious.

The Respondent lastly makes the emotionally compelling but legally infirm argument that by "'drinking to the point of unconsciousness ... Petitioner forfeited his statutory opportunity under Wis. Stat. § 343.305(4) to withdraw consent.'" *Id.* at 8.

Thus, Respondent asserts that Petitioner "'voluntarily consented to a blood draw by his conduct of driving on Wisconsin's roads and drinking to the point of intoxication.'" *Id.*

In making these arguments, Respondent ignored a critical reality that this Court recognized and addressed in *Birchfield*: that the most likely

situation where such a wrongful forfeiture of this cherished constitutional protection would be wrought is in situations where a driver is unconscious as a result of an accident, injury, or medical condition.

If the legal arguments presented by Respondent are accepted, the Court would give law enforcement officers across the country *carte blanche* authority to perpetrate invasive, warrantless bodily intrusions upon all drivers injured in an accident who are "unconscious" or "semiconscious" or "confused" or "disoriented" or "not properly oriented" (all terms frequently used by physicians describing patients seen in emergency rooms) or suffering from any medical condition which, in the opinion of the officer, causes the driver to appear unable to fully understand his or her circumstances and therefore incapable of consenting to or declining a chemical test.

There is obviously a temptation to carve out an exception for that rare situation where a person is capable of driving but has been drinking or using drugs "to the point of [eventual] unconsciousness." Before the Court succumbs to that temptation, it must first consider how that exception would work in practice.

The Court has long warned that "[t]he point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise

of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

Similarly, "[i]t has been repeatedly decided that these Amendments [to the Constitution] should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers." *Gouled v. United States*, 255 U.S. 303, 304 (1921).

If this Court carves out an exception that only applies when a person has "consumed alcohol [or drugs] to the point of unconsciousness" but does not apply to individuals who are suffering from injuries or medical conditions, it will place the job of determining whether this inherently dubious exception applies in the hands of some of the most often well-intentioned but frequently — and mistakenly — overzealous members of law enforcement: DUI patrol officers.

Such a holding would put these officers in the position of making a medical evaluation and decision as to whether a person's disposition is solely the result of alcohol or drug consumption or is the result of a medical condition. Moreover, the officer would know that one "conclusion" would allow him to proceed without a warrant while the other would require him to attempt to obtain a warrant.

Common sense, experience and recent headlines advise us that it is not wise to put officers bent upon ferreting out possible crime in the position of making medical judgements about those they

suspect of committing an offense when it can be avoided. See, e.g., "Police chief suspends officer in connection with DUI arrest of suspect who died days later," Live5 WCSC News (February 25, 2019) http://www.live5news.com/2019/02/25/police-chief-officer-suspended-connection-with-dui-arrest/ (last accessed March 3, 2019).

The instant case does not present a situation where we need to place zealous investigating officers in the position of physicians on a mission. To do so would be to invite drastic consequences. The Court must reiterate and make clear that warrantless blood draws are prohibited by the Fourth Amendment and that the two relevant exceptions are those that it has already long-recognized: (1) actual, voluntary, uncoerced consent, and (2) where it is established that under the specific factual circumstances then presented, officers did not have the ability to obtain a warrant in a timely manner.

Carving out additional exceptions, splitting hairs or leaving questions unanswered benefits no one and does not actually promote the apprehension and conviction of those who are guilty of DUI as it only muddies the water. A clear, concise, unanimous opinion by this Honorable Court would, however, benefit all.

B. Heightened Privacy Interests Involved in Blood Draw Cases Make It Extremely Reasonable to Require An Officer to Obtain a Search Warrant Before Drawing The Blood of an Unconscious Person.

It has long been recognized that a blood test is more intrusive than a breath test because "[blood tests] 'require piercing the skin' and extract a part of the subject's body. . . [and] place[ ] in the hands of law enforcement authorities a sample that can be preserved from which it is possible to extract information beyond a simple BAC reading." *Birchfield,* 136 S. Ct. at 2178. Blood tests are a search that go far beyond the body's surface and implicate "important 'interests in human dignity and privacy,' and impinge on far more sensitive interests than the typical search of the person of an arrestee." *Id.* at 2183 (citing *Schmerber v. California*, 86 S. Ct. 1826 (1966)).

Although a "search conducted pursuant to ... valid consent is constitutionally permissible," *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973), valid consent is "in fact, freely and voluntarily given." *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). The Fourth Amendment requires that an arrestee's voluntary consent be independent of implied consent. *State v. Butler*, 232 Ariz. 84 (2013). Moreover, "[v]oluntariness is a question of fact," *Schneckloth*, 412 U.S. at 248-49, which "is assessed from the totality of the circumstances." *Id.* at 227. "[The government's] burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper*, 391 U.S. at 548-49.

Because an unconscious suspect is incapable of showing even the slightest bit of acquiescence to a warrantless blood draw, the State cannot presume that the suspect has given actual, voluntary consent under the totality of the circumstances merely because they agreed to drive on the roads of the state.

The State bears the burden of proving how actual, voluntary consent can be obtained from an individual that is incapacitated and unable to respond to any request for chemical testing.

Because of the serious privacy implications that are associated with blood tests, it is not unreasonable to require an officer to obtain a search warrant before drawing the blood of an unconscious DUI suspect.

As *McNeely* recognized, "technological developments that enable police officers to secure warrants more quickly, and do so without undermining the neutral magistrate judge's essential role as a check on police discretion, are relevant to an assessment of exigency. That is particularly so in this context, where BAC evidence is lost gradually and relatively predictably." *McNeely*, 569 U.S. at 155. Most states, including Wisconsin, have statutes that authorize officers to obtain warrants electronically.

> **Wis. Stat. § 968.12 (2)** *Warrant upon affidavit.* A search warrant may be based upon sworn complaint or affidavit, or testimony recorded by a phonographic reporter or under sub. (3)(d), showing probable cause therefor. The complaint, affidavit or testimony may be upon information and belief. The person requesting the warrant may swear to the complaint or affidavit before a notarial officer authorized under s. 706.07 to take acknowledgments or before a judge, **or a judge may place a person under oath via telephone, radio, or other means of**

> **electronic communication, without the requirement of face-to-face contact, to swear to the complaint or affidavit.** The judge shall indicate on the search warrant that the person so swore to the complaint or affidavit. (Emphasis added).

The application and issuance of electronic warrants is also discussed in further detail in Wis. Stat. § 968.12(3)(b)(2) (the provision addressing warrants upon oral testimony). Thus, while a breath test is the less intrusive alternative to a blood test and is not available to the unconscious suspect, there is nothing that prevents officers from applying for a search warrant through electronic means in order to ensure that the *more* intrusive test is conducted in a way that protects the constitutional rights of the suspect. In addition, all states may and probably should authorize the application and issuance of electronic warrants to expedite the process.

Wisconsin is urging this Court to create the type of *per se* rule that was rejected in *McNeely*. The only distinguishing factor in the instant case is that the State is asking for a *per se* rule that would apply to individuals that are incapacitated and incapable of giving actual, voluntary consent as required by the Fourth Amendment and its progeny. Such a rule would not only allow states to enact statutes that are effectively waivers of a suspect's constitutional rights, but it would also be in direct contradiction of the analysis and reasoning in *McNeely* and *Birchfield*.

> [A]dopting the State's *per se* approach would improperly ignore the current and future technological developments in warrant procedures, and might well diminish the incentive for jurisdictions 'to pursue progressive approaches to warrant acquisition *that preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement.*'

McNeely, 569 U.S. at 156 (emphasis added).

The State's interest in promoting highway safety and deterring drunk driving cannot overcome the value of protecting the constitutional rights drafted by our Framers. As this court held in *Arizona v. Gant*, 556 U.S. 332, (2009), the State's interests do not:

> outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected. If it is clear that a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any law enforcement "entitlement" to its persistence. *Cf. Mincey v. Arizona*, 437 U.S. 385, 393, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978) ("[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment).

Id. at 349.

Amicus also believes that advances in DNA testing and the seemingly daily news about database breeches further support the heightened privacy concerns implicated in blood draw cases. For example, in *Birchfield*, in distinguishing breath procedures from blood draws, this Court noted "in prior cases, we have upheld warrantless searches involving physical intrusions that were at least as significant as that entailed in the administration of a breath test. Just recently we described the process of collecting a DNA sample by rubbing a swab on the inside of a person's cheek as a "negligible" intrusion. *Maryland v. King*, 569 U.S. ___, ___, 133 S.Ct. 1958, 1969, 186 L.Ed.2d 1 (2013)." *Birchfield*, 136 S. Ct. 2160, 2177 (2016).

But while obtaining a breath sample was no more of a bodily intrusion than rubbing a swab inside a person's mouth, the Court emphasized a critical distinction here, that: "breath tests are capable of revealing only one bit of information, the amount of alcohol in the subject's breath. In this respect, they contrast sharply with the sample of cells collected by the swab in *Maryland v. King*." *Id.*

The Court also noted "[a]lthough the DNA obtained under the law at issue in that case could lawfully be used only for identification purposes, 569 U.S., at ___, 133 S.Ct., at 1967-68, ... the process put into the possession of law enforcement authorities a sample from which a wealth of additional, highly personal information could potentially be obtained. A breath test, by contrast, results in a BAC reading on

a machine, nothing more. No sample of anything is left in the possession of the police." *Id.*

Thus, while this Court has approved warrantless DNA collection for certain *limited purposes*, it has also acknowledged the fact that DNA contains a wealth of additional, highly personal information and thus distinguishes it from a breath sample. To this point, it should be noted that there are *no* limitations on the use or retention of the blood sample collected under Wisconsin statutes, nor any restriction on the use or dissemination of the data that may be obtained in the analysis of the sample.

Thus, approving the warrantless blood draw in this case, unlike in a case involving a warrant, permits the government to obtain this highly personal, highly sensitive information with no restriction of the use of the sample once it is in the possession of the government or the use or dissemination of information gained through any analysis the government may choose to conduct on that sample.

As noted earlier in this brief, creating such an exception is unnecessary as *McNeely* provides the proper directives as to how an officer can obtain a blood draw without the need for a new exception.

C. A State Cannot Enact A Statute That Directly Infringes Upon the Constitutional Rights of Individuals and Cannot Waive a Suspect's Constitutional Rights Through a Statute.

If this Court adopts the arguments presented by Wisconsin, it will give every state the authority to

enact statutes that directly infringe on or eviscerate citizens' constitutional rights. Such a decision would have ripple effects reaching far beyond the realm of drunk driving legislation, and it would open the door to excessive governmental abuses that our Constitution was designed to prevent. The State contends that it can create consent and waive an individual's constitutional protections through a statute. If this were so, what would stop the government from imposing limits on other constitutional rights through statutes? A state could choose to amend their license-to-carry-firearms statutes and include a condition stating that – merely by obtaining the license to carry – that individual has impliedly consented to a warrantless full body search by a police officer investigating any crime involving a gun. (Justice Blackwell of the Supreme Court of Georgia posed a similar scenario to the State of Georgia during oral arguments in *Elliott v. State*, S18A1204 (2019)).

The State has relied on the holdings in *Florida v. Jardines*, 569 U.S. 1 (2013), *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978), and *Birchfield* for its determination that consent may be implied, however these cases have no bearing on the issues raised and do not in any way support the conclusion that a statute may serve as a waiver of a constitutional right. *Jardines* held that by placing a knocker on one's front door, an individual has implicitly invited visitors to approach the curtilage of the home through the "home path," and grants visitors the ability to "knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Jardines*, 569 U.S.

at 8. However, this Court specifically noted that while an officer may enter the curtilage of an individual's home under the same circumstances as a visitor, the privilege to enter the curtilage only gives an officer without a warrant the ability to approach the home and knock "precisely because that is 'no more than any privilege a citizen might do.'" *Id.* A private citizen does not have the ability to obtain a blood sample from another private citizen, and thus, *Jardines* is impertinent to the determination of whether a statute can serve as a substitute to voluntary consent. Further, as the *Jardines* Court expressly noted:

> The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose. . . **Here, the background social norms that invite a visitor to the front door do not invite him there to conduct a search**.

Id. at 9 (emphasis added).

The State's contention that the case of *Marshall v. Barlow's, Inc.* is relevant to its view of implied consent is even more puzzling, given that this Court found that the statutory authorization of warrantless searches of a business's work areas was unconstitutional under the Fourth Amendment. *Marshall,* 436 U.S. at 307. The statute this Court deemed unconstitutional in *Marshall* authorized the Secretary of Labor to search the work areas of any employment facility that was regulated under the Occupational Safety and Healthy Act of 1970

("OSHA"). The owner of an electrical and plumbing installation business (subject to the regulations provided in OSHA) was approached by a government inspector who sought to inspect the non-public areas of his business without a warrant, and the case came before this Court after the business owner refused to allow the warrantless search based on his protections guaranteed under the Fourth Amendment.

Similar to *Jardines*' holding that an officer can do no more than a visitor would upon entering the curtilage of an individual's home without a warrant, *Marshall* found that

> [w]ithout a warrant [the Government inspector] stands in no better position than a member of the public. What is observable by the public is observable, without a warrant, by the Government inspector as well. *The owner of a business has not, by the necessary utilization of employees in his operation, thrown open the areas where employees alone are permitted to the warrantless scrutiny of Government agents.*

Id. at 315 (emphasis added).

The business owner in *Marshall* did not agree to unchecked warrantless searches by operating a business regulated under OSHA, just like the Petitioner did not agree to unchecked warrantless searches of his body while unconscious by merely driving on the roadways of Wisconsin.

The State has vainly tried to extend *Marshall*'s discussion of warrantless searches for closely regulated industries like firearms and alcohol to governmental regulations of the highways and the operation of motor vehicles. *Marshall* explains that the alcohol and firearm industries are "exceptions [because] they represent . . . relatively unique circumstances . . . [and] have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise." *Marshall,* 436 U.S. at 313. This Court's recent holdings in *McNeely* and *Birchfield* have made it abundantly clear that a DUI suspect **does** have a reasonable expectation of privacy while driving on the roadways, regardless of whether a state has an implied consent statute.

II. IMPLIED CONSENT IS NOT A SUBSTITUTE FOR THE ACTUAL, VOLUNTARY CONSENT REQUIRED FOR A WARRANTLESS BLOOD DRAW.

The State has yet to provide any legal support for its contention that this Court's reasoning and analysis were incorrect in *McNeely* and *Birchfield.* This Court found that the search incident to arrest, one of most recognized exceptions to the warrant requirement, did not categorically apply to blood testing of DUI suspects due to, among other things, the privacy rights of such individuals. The concept of the search incident to arrest has an ancient pedigree of sound legal analysis, but this Court refused to extend it to permit intrusive, warrantless blood tests

in *Birchfield*. This Court even predicted this exact circumstance and specifically found that law enforcement would be required to apply for a warrant or rely on the exigent circumstances exception to a warrant. A state statute that purports to waive a fundamental constitutional right of all those individuals who drive on its roads is offensive to the Constitution. The search incident to arrest doctrine has already been rejected by this Court under the exact same circumstances as this case.

The State argues that by driving on the roads, the Petitioner "impliedly consented" to warrantless blood draws. In *State v. Ryce*, 368 P.3d 342 (Kan. 2016), *adhered to on reh'g*, 396 P.3d 711 (Kan. 2017), the Supreme Court of Kansas addressed the illogical conclusion that "implied consent" means every driver is deemed to have given actual consent to testing for DUI:

> While the implied consent scheme may operate on the assumption that drivers have 'deemed to have consented' to tests for DUI purposes, '**[w]hen that person has expressly refused consent ... it would be incongruous and oxymoronic to say the person was deemed to have consented to the test.**'

Id. at 356 (emphasis added).

Ryce addresses the core issue of the State's position; that a driver has deemed to have given consent by driving on the roadways. Wisconsin

provides (conscious) DUI suspects the statutory right to withdraw consent to chemical testing pursuant to Wis. Stat. § 343.305(4); thus "it would be incongruous and oxymoronic" to say that a suspect who has withdrawn consent under this statute has given the State unbridled implied consent to chemical testing for DUI merely by driving on the roadways. *Id.*

A. There Are Limits To The Consequences To Which Motorists May Be Deemed To Have Consented By Virtue Of A Decision To Drive On Public Roads.

"There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." *Birchfield,* supra, at 2185. Justice Alito was absolutely correct – implied consent laws cannot give the state carte-blanche authority to circumvent the Constitution in their pursuit of evidence.

Implied consent laws do not give any State unlimited license to violate the Constitution or infringe on the rights of motorists. Justice Alito's opinion for the Court in *Birchfield* stands for the clear principle that implied consent laws simply must have limits. *Id.* at 2185. This case presents this Court with an ideal vehicle to articulate those limits.

The State's core argument is stunning in its breadth. Wisconsin would have this Court accept that a state legislature may pass a law that says all drivers, state-wide, hereby give their free and voluntary consent to intrusive searches of their person. If such a principle were extended to its logical conclusion, statutory law would soon eviscerate and

completely displace the long line of case law regarding consent, instructing courts to look to the totality of the circumstances when determining the existence of free and voluntary consent. *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

In addition, a world where a state could legislatively deem voluntary consent into existence would not logically stop at persons who were unconscious. If free and voluntary consent were truly able to be deemed into existence by statute, then such a principle would equally apply to each and every driver on the roads. Every person arrested for a DUI offense would not need to be asked for consent to search; it would be presumed. Officers would be free to compel any driver arrested for DUI to submit to a blood draw, because the legislature had already deemed their consent.

In addition, if free and voluntary consent is taken out of the constitutional framework and made subject to statutory law, what would stop a State from statutorily declaring that the consent is conclusively presumed under specific circumstances, thereby taking away a person's ability to affirmatively decline to consent to a warrantless search?

It is not a logical stretch at all to see that the State's proposed principles completely eviscerate the concept of free and voluntary consent, instead leading to a system of legislatively-mandated limits on a person's ability to decline to be subjected to a warrantless search of their bodily fluids. A State legislative scheme whereby a person, conscious or unconscious, is conclusively deemed to have consented

to a warrantless blood draw is no different at its core than the State's scheme at issue today – if a State can displace the constitutional framework requiring free and voluntary consent merely by legislating it away, then there are truly no meaningful limits on the government's power to deem a constitutional right waived by virtue of a decision to drive on public roads.

A foundational principle of the constitutional doctrine of consent is that it is a free and voluntary choice made by the individual, considering the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). This Court was therefore completely correct when it said there must be meaningful limits to implied consent laws. *Birchfield, supra,* at 1285. This case presents this Court with a perfect opportunity to enforce that provision – that a statute may not circumvent the constitution and deem actual and voluntary consent into existence merely by virtue of a person's decision to drive on a public roadway.

B. Implied Consent Statues Only May Require Drivers To Provide Consent In Certain Circumstances; They Do Not Act As A Substitute For Consent.

Cemented in *Birchfield* is the proposition that implied consent statutes are statutes which provide for administrative and evidentiary sanctions for motorists who refuse to consent to evidentiary searches of the person's bodily fluids. *Birchfield*, supra, at 2185. ("Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary

consequences on motorists who refuse to comply.") Rejected in *Birchfield* is the proposition that these laws can go any further, by – for example – imposing criminal penalties on a person's refusing consent to a warrantless blood draw. *Id.*

The Court summarized much of the same in *McNeely*, stating that these laws require the motorist to give consent to the test in certain circumstances or face driver's license sanctions or evidentiary penalties. 569 U.S. at 161. These statutes are thus best understood as using a carrot-and-stick approach to *entice* consent – offering a benefit of showing that a person is not impaired and safe to drive (and retaining their privilege to drive), while threatening a detriment of license sanctions and evidentiary consequences to those who refuse or are unable to grant consent.

McNeely and *Birchfield* together have only blessed implied consent laws that impose administrative or evidentiary consequences on a person when they refuse to grant consent to search the person's bodily substances when appropriate.[2] In contrast, there is nothing in either opinion that indicates the Court believed that the statutory consent was a substitute for free and voluntary consent. In fact, the court squarely contradicted that

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[2] *Amicus* would note that there are serious constitutional concerns raised where the government imposes administrative or evidentiary sanctions on a person who exercises his constitutional right to be free from warrantless searches and refuses to consent to a blood test. However, since that issue is not squarely presented in the facts of this case, it is not properly before the Court and *Amicus* will not address it any further.

position under the *Beylund* companion case in *Birchfield*, supra, at 2186. In that case, the Supreme Court acknowledged that Petitioner Beylund only consented to a blood draw when he was provided legally inaccurate information about the State's ability to punish him for refusing the test. This Court, however, made clear that the proper standard for evaluating the issue was to look at the totality of the circumstances to see if Mr. Beylund had provided free and voluntary consent. *Id.*

CONCLUSION

The Respondent will undoubtedly portray this as "the sky is falling" situation which must be solved by a new exemption to the warrant requirement which further encroaches upon citizens' Fourth Amendment rights. However, nothing could be further from the truth.

There is no doubt that in this case had the officers sought a warrant, as commanded by *McNeely*, they would have either obtained a warrant, or, if they legitimately attempted to obtain a warrant and were unable to do so, they would have then been able to obtain a constitutionally valid blood draw under the "exigent circumstances" exception.

Thus, the real problem at the core of current blood draw cases is that some state legislatures and, to an extent, some state courts, have been slow to acknowledge or accept this Court's clear pronouncements in *McNeely* and *Birchfield*. As a result, law enforcement officers have felt free to

operate under the assumption that they do not need a warrant.

The solution to the problem is not to retreat from the holdings in *McNeely* and *Birchfield,* nor to allow state legislatures to manufacture and assign to all driving citizens a fictitious consent.

The solution to the problem is to forcefully and unanimously reiterate the basic pronouncements in *McNeely* and *Birchfield* regarding the Fourth Amendment's warrant requirement.

For all of the foregoing reasons, *amicus* DUIDLA respectfully requests that this Court reverse the decision of the Wisconsin Supreme Court and make it clear that implied consent laws are not a substitute for the actual, voluntary consent required under the Fourth Amendment when the government seeks to conduct a warrantless blood draw.

Respectfully submitted,

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No. 18-6210

In The Supreme Court of the United States

GERALD P. MITCHELL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Wisconsin

BRIEF OF AMICI CURIAE LEAGUE OF WISCONSIN MUNICIPALITIES, WISCONSIN TOWNS ASSOCIATION, AND CITY OF EAU CLAIRE IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The League of Wisconsin Municipalities was created on December 14, 1898 to help Wisconsin cities and villages share ideas and learn from one another, to train and provide information to the people elected and appointed to govern those cities and villages, and to advocate on their behalf with the Wisconsin Legislature, Governor, and state agencies. Many of the League's members investigate and prosecute impaired driving offenses.

The Wisconsin Towns Association is a statewide, voluntary, non-profit and non-partisan association of member town and village governments that provides education, legal information, and grassroots legislative advocacy to Wisconsin towns and villages. A number of the Association's members investigate and prosecute impaired driving offenses.

The City of Eau Claire is Wisconsin's ninth largest city. The City of Eau Claire investigates and prosecutes hundreds of impaired driving cases each year.

Amici curiae have a strong interest in ensuring that courts interpret the United States Constitution in a manner that allows Wisconsin villages, cities, and towns to protect its citizens from the serious danger

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[1] Blanket consent from both parties to the filing of *amicus* briefs have been filed with the Clerk. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amicus curiae* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

posed by impaired driving, while at the same time protecting important civil liberties.

The communities represented by *amici curiae* expend significant resources addressing impaired driving. These communities seek clear guidance that provides reasonable opportunities for law enforcement to gather necessary evidence in impaired driving cases.

SUMMARY OF THE ARGUMENT

The Court should provide clear rules to law enforcement agencies across the country attempting to gather evidence necessary to investigate and prosecute impaired driving violations while also protecting important civil liberties. Current rules are not sufficiently clear.

The Court should overrule *McNeely* and determine that the natural dissipation of alcohol and drugs constitutes a per se exigency permitting warrantless blood draws. *McNeely* lacks clear guidance for law enforcement, involved four separate opinions, and did not sufficiently consider the impact of the rules it articulated on drug impaired driving investigations. Circumstances in impaired driving cases are often typical, and the Court should provide clear guidance on how police should handle them.

The *McNeely* approach leads to delays which result in evidence destruction, confusion for law enforcement and courts on what the *McNeely* standard

permits, and simultaneously provides little judicial oversight. The minimal judicial oversight provided in most cases does not justify the inevitable destruction of relevant evidence, the increased litigation the confusing *McNeely* standard creates, and the burden placed on the judiciary (particularly in rural areas with few judges).

Overruling *McNeely* will eliminate the need for the Court to consider the implied consent law issue in this case. If the Court examines the implied consent issue, it should adopt the State of Wisconsin's recommended approach and determine that the implied consent law's application to an unconscious driver is valid either as a consent search, or as a reasonable condition to combat intoxicated driving.

In the alternative, the Court should adopt the standard articulated in Chief Justice Roberts' opinion in *McNeely*. If a police officer reasonably believes he or she cannot obtain a blood draw warrant without delaying the blood draw, that constitutes an exigency permitting a warrantless blood draw.

Adopting a per se exigency standard in impaired driving cases reasonably considers the importance of timely blood draws in drug impaired driving cases. It also recognizes that it can be difficult for police officers to precisely determine what combination of alcohol and drugs an impaired driving suspect has consumed, especially where the suspect, like the suspect in this case, is unconscious.

A decision in favor of Mitchell will likely invite further litigation and confusion, particularly in Wisconsin, the only state with civil impaired driving violations.

ARGUMENT

I. The Court can provide clear, reasonable rules to law enforcement and courts across the country.

Reasonableness is always the touchstone of Fourth Amendment analysis. *See Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943 (2006). The Court should provide clear rules that reasonably weigh law enforcement's ability to gather necessary evidence of impaired driving against important civil liberties.

Impaired driving is a crisis in this country. Removing impaired drivers from the road when they are impaired does not end the threat. The high volume of repeat impaired drivers is due to the high volume of people addicted to drugs and alcohol. Impaired driving enforcement is not only about ensuring justice and eliminating the immediate threat. It is also about helping to ensure that people struggling with addiction get resources they need, but may not voluntarily accept without a court order so that reductions in repeat impaired driving can occur.

A. The Court should overrule *McNeely*, which allows evidence destruction while providing little judicial oversight.

The Court should overrule *McNeely* and determine that the natural dissipation of alcohol and drugs constitutes a per se exigency permitting warrantless blood draws. *McNeely* lacks clear guidance for law enforcement and courts, involved four separate opinions, and did not sufficiently consider the impact of the rules it articulated on drug impaired driving cases. *See Missouri v. McNeely*, 569 U.S. 141, 166-67, 133 S.Ct. 1552 (2013) (Roberts, C.J., concurring in part and dissenting in part) (noting that despite the often "typical" circumstances in drunk driving cases, a police officer reading *McNeely* "would have no idea – no idea – what the Fourth Amendment requires of him . . . "). *Amici curiae* do not believe adopting a per se exigency approach requires overruling *Birchfield* which examined different issues.

The *McNeely* approach leads to blood draw delays which result in evidence destruction while simultaneously providing little judicial oversight. *See McNeely*, 569 U.S. at 180-81 (Thomas, J., dissenting) ("The Court's judgment reflects nothing more than a vague notion that everything will come out right most of the time so long as the delay is not too lengthy."); *see also Brigham City*, 547 U.S. at 403 (noting warrantless searches are permissible to "prevent the imminent destruction of evidence"). The minimal judicial oversight provided in most cases does not justify the inevitable destruction of relevant evidence, as well as the burden

placed on the judiciary (particularly in rural areas with few judges). *See* Jessica Miller & Aubrey Wieber, *Warrants approved in just minutes: Are Utah judges really reading them before signing off?*, Salt Lake Trib., January 14, 2016.

Overruling *McNeely* will eliminate the need for the Court to consider whether Wisconsin's implied consent law applied to unconscious drivers is valid as either a consent search or as a reasonable condition to combat drunk driving, although *amici curiae* agree with the State of Wisconsin's position on these issues. *See Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016) (Thomas, J., dissenting) ("The better (and far simpler) way to resolve these cases is by applying the per se rule that I proposed in *McNeely*. Under that approach, both warrantless breath and blood tests are constitutional because 'the natural metabolization of [BAC] creates an exigency once police have probable cause to believe the driver is drunk. It naturally follows that police may conduct a search in these circumstances.'"). Circumstances in impaired driving cases are often typical, and the Court should offer clear guidance on how police should handle them.

Factors supporting overruling *McNeely* include the divided nature of the decision which calls the decision into doubt; no serious reliance interests have built up around the decision; and the decision is wrongly decided, it produces general injustice, and less harm will result from overruling the decision and providing clear rules than from allowing it to stand. *See* Bryan A. Garner, et al., *The Law of Judicial Precedent*, 388-403

(2016); *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597 (1991) (noting the narrow margins and spirited dissents in overruling two recent cases).

In the alternative, the Court should adopt the standard articulated in Chief Justice Roberts' opinion in *McNeely*. *See McNeely*, 569 U.S. at 166-67 (Roberts, C.J., concurring in part and dissenting in part). If a police officer reasonably believes he or she cannot obtain a blood draw warrant without delaying the blood draw, that constitutes an exigency permitting a warrantless blood draw.

A typical impaired driving case involves something similar to the following facts which lend themselves to clear standards. Police officers observe a traffic violation or respond to a crash. In making contact with the driver, police officers observe signs of impairment such as slurred speech, bloodshot or glassy eyes, the odor of intoxicants, slow reaction times, lack of coordination, or other behavior suggesting impairment. Police officers may observe evidence of alcohol or drugs in the motor vehicle or on the impaired driving suspect's person. Sometimes citizen witnesses observe and report bad driving or signs of impairment to the police.

Based on observations of bad driving and indicia of impairment, police officers typically ask the defendant to perform standardized field sobriety tests to observe other signs of impairment. Prior to requesting field sobriety tests, police officers typically first request a backup officer to respond to the scene. Backup

officers ensure the primary officer and the impaired driving suspect's safety from oncoming traffic as most field sobriety tests are administered roadside. Depending on the traffic stop or accident's location, other officers' availability, and other variables, waiting for backup can sometimes create delays, particularly in rural areas. *See* Taylor Holt, *Douglas Co. Officials explain why Jayme Closs response took so long*, https://www.weau.com/content/news/Douglas-Co-Officials-explain-why-Jayme-Closs-response-took-so-long-504430552.html (noting it took 30 minutes for law enforcement to arrive at scene where citizen witnesses found kidnapping victim that was part of nationwide law enforcement search despite officers traveling over 100 mph because of the location's rural nature and road conditions).

After administering field sobriety tests, police officers often request the driver submit to a roadside preliminary breath test. A roadside preliminary breath test is generally admissible for probable cause determinations, but the test result is generally not admissible at trial. Wis. Stat. § 343.303. Police officers also consider roadside preliminary breath test results to determine if impairment might be based on drug use rather than alcohol use. Significant impairment accompanied by a low blood alcohol concentration often indicates drug use. If the totality of the circumstances demonstrates impairment the driver is placed under arrest.

After the driver is placed under arrest he or she is given the opportunity to submit to a chemical test of

his or her blood, breath, or urine. Law enforcement agencies typically get to choose which test an impaired driving suspect takes first, and most law enforcement agencies have a primary test they offer most alcohol impaired driving suspects. The suspect typically has the opportunity to request another test in addition to the law enforcement agency's primary test. Some law enforcement agencies, such as the City of Eau Claire, choose blood as a primary test because it is considered the most reliable test for both drugs and alcohol, and because timely blood draws are critical to drug impaired driving investigations.

If a roadside preliminary breath test result showed a sufficiently high blood alcohol concentration, and the law enforcement agency's primary test is breath, then the police officer will typically request an evidentiary breath test (or a urine test, although urine tests are infrequently used in impaired driving cases). If there is significant impairment and the roadside preliminary breath test result is low, suggesting the impairment is drug related, or if the officer has gathered evidence suggesting drug impairment, or if the law enforcement agency's primary test is blood, then the police officer will request an evidentiary blood test.

If the impaired driving suspect refuses to submit to a test, and the impaired driving violation is not a civil violation, the police officer will attempt to obtain a warrant to obtain a blood sample from the suspect. If the impaired driving violation is a civil violation, the police typically will not apply for a blood draw warrant, and will instead simply charge the defendant with a

civil refusal charge. A civil refusal counts as an impaired driving conviction in Wisconsin. Not surprisingly, police officers request most blood draw warrants late at night, during early morning hours, and on weekends, which can be burdensome in rural counties with a single or few judges available. Typically the amount of evidence supporting probable cause for arrest and the blood draw warrant is overwhelming.

Unconscious impaired driving suspects present various challenges. If an impaired driving suspect is unconscious, like Mitchell in the present case, then a breath or urine test is not possible, and the only option is an evidentiary blood test. An unconscious impaired driving suspect also cannot typically provide a roadside preliminary breath test sample, which makes it more difficult to ascertain if his or her impairment is due to alcohol, drugs, or some combination of intoxicants.

Impaired driving investigations involving accidents or injuries can provide additional variables and challenges for investigating officers not listed above.

1. The Court should adopt clear rules.

The Court should adopt the following clear rules. First, the Court should determine that the natural dissipation of alcohol and drugs constitutes a per se exigency permitting warrantless blood draws when probable cause to arrest an impaired driving suspect exists. This rule provides a bright line that law enforcement and courts can easily understand, and ensures

that necessary evidence is not destroyed. *See Birchfield*, 136 S.Ct. at 2196-98 (Thomas, J., dissenting). Any delay in drawing blood is critical in drug impaired driving cases. Delays can also critically impact cases where repeat drunk drivers cannot drive with a blood alcohol concentration at or above .02, in cases that implicate higher threshold penalties for driving with a blood alcohol concentration above .15, and a variety of other circumstances.[2]

Adopting this rule would also leave sufficient remedies in place if law enforcement takes a warrantless blood sample without probable cause. Defendants would retain the ability to move to suppress the blood evidence, and also retain the ability to file civil rights lawsuits against the law enforcement agency that improperly took a warrantless blood sample. These remedies provide sufficient incentive for law enforcement to perform their duties consistent with legal requirements.

Second, in the alternative, the Court should adopt the standard articulated in Chief Justice Roberts' opinion in *McNeely*. If a police officer reasonably believes he or she cannot obtain a blood draw warrant without delaying the blood draw, that constitutes an exigency

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[2] Adopting this rule would eliminate the need for the Court to engage in the implied consent analysis in this case. However, if the Court examines the implied consent issue, it should adopt the State of Wisconsin's recommended approach and determine that the implied consent law's application to an unconscious driver is valid either as a consent search, or as a reasonable condition to combat intoxicated driving.

permitting a warrantless blood draw. Simply put, no rule which permits evidence destruction in impaired driving cases is reasonable or consistent with the Court's jurisprudence on the imminent destruction of evidence constituting an exigency. *See Brigham City*, 547 U.S. at 403; *see also McNeely*, 569 U.S. 141 at 176-82 (Thomas, J., dissenting) (noting that "[e]ven a slight delay may significantly affect the probative value in borderline cases of suspects who are moderately intoxicated or suspects whose BAC is near a statutory threshold that triggers a more serious offense."). If the Court is unwilling to adopt a per se exigency bright line standard, it should adopt a rule stating if a police officer reasonably believes he or she cannot obtain a blood draw warrant without delaying the blood draw, that constitutes an exigency permitting a warrantless blood draw.

B. Adopting a per se exigency standard in impaired driving cases reasonably considers the importance of timely blood draws in drug impaired driving cases.

The Court should adopt clear and reasonable rules that sufficiently consider the importance of maintaining the best evidence in drug impaired driving cases. Blood draw delays in drug impaired driving cases can significantly frustrate the ability to prosecute or defend the case because most drugs are not eliminated from the human body at a linear rate similar to alcohol. The non-linear elimination of drugs makes it

extremely difficult to extrapolate backwards and estimate drug concentration at the time of driving.

Drug impaired driving is a growing problem in the United States, and studies suggest up to 22% of drivers involved in accidents use drugs, often in combination with alcohol. *See* Sarah Kerrigan, *Drug Toxicology for Prosecutors*, American Prosecutors Research Institute, 2004, https://ndaa.org/wp-content/uploads/drug_toxicology_for_prosecutors_04.pdf; *see* Fernando A. Wilson, et al., *Fatal Crashes from Drivers Testing Positive for Drugs in the U.S., 1993-2010*, 129 Pub. Health Rep. 342 (2014); Erin Allenman, *Why Your Fourth Amendment Rights Don't Matter: How Birchfield Overlooks the Testing of Drugged Drivers*, 28 Widener Commw. L.Rev. 105 (2019); *see also* Center for Disease Control and Prevention: *Impaired Driving: Get the Facts*, https://www.cdc.gov/motorvehiclesafety/impaired_driving/impaired-drv_factsheet.html. The Institute for Behavior and Health estimates that drugged driving causes 20% of automobile crashes, which translates into 8,600 deaths, 580,000 injuries, and $33 billion in property damage each year in the United States. IBH Public Policy Statement 1 (citing Substance Abuse & Mental Health Servs. Admin., Results from the 2007 National Survey on Drug Use and Health: National Findings (2008), http://oas.samhsa.gov/nsduh/2k7nsduh/2k7results.pdf).

Marijuana use and marijuana impaired driving are increasing. The most recent national data found marijuana present in 12.2% of all fatally injured drivers tested for drugs. Allenman at 105. As states

continue to legalize medical and recreational marijuana, an increase in marijuana related impaired driving is likely, and the Centers for Disease Control and Prevention reports that 13% of nighttime and weekend drivers have marijuana in their system. Center for Disease Control and Prevention: *Impaired Driving: Get the Facts*, https://www.cdc.gov/motorvehiclesafety/impaired_driving/impaired-drv_factsheet.html. The National Highway Traffic Safety Administration ("NHTSA") reported an increase in the number of drivers using marijuana or other illegal drugs from 2007 to 2015. Allenman at 117.

In addition to marijuana, increases in other impairment causing drugs exist. In 2017, the United States Department of Health and Human Services declared opioid abuse to be a "public health emergency." U.S. Department of Health and Human Services, *What is the U.S. Opioid Epidemic?* https://www.hhs.gov/opioids/about-the-epidemic/index.html. Each day, 91 people die from opioid overdoses. *Id.* Not surprisingly, a recent study concluded that prescription opioid use is associated with increased risk of involvement in a fatal two-vehicle crash, due in large part to a failure to stay in the proper lane. Stanford Chihuri, Guohua Li, *Use of Prescription Opioids and Initiation of Fatal 2-Vehicle Crashes*, https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2724775. Millions of drivers in the United States take licit and illicit drugs before driving. Tina Wescott Cafaro, *Slipping Through the Cracks: Why Can't We Stop Drugged Driving*, 32 W.New. Eng. L.Rev. 33, 35 (2010); Substance Abuse &

Mental Health Servs. Admin., U.S. Dept. of Health & Human Servs., Results from the 2006 National Survey on Drug Use and Health, National Findings 2 (2007), http://oas.samhsa.gov/nsduhl/2k6nsduh/2k6results.pdf.

Hazardous inhalants and volatile substances are another growing area of impaired driving, and chemical evidence of these substances only stay in a user's system for a short time. *See* R.J. Flanagan, et al., *Volatile Substance Abuse, Practical Guidelines for Analytical Investigation of Suspected Cases and Interpretation of Results*, United Nations Office on Drugs and Crime, https://www.unodc.org/pdf/technical_series_1997-01-01_1.pdf (noting an estimate that 7 to 12% of American high school students have used volatile substances, that about 4% use volatile substances regularly, that volatile substances can produce central nervous system effects similar to those of other sedatives, and that volatile substances can induce more profound effects such as delusions and hallucinations); *see also* Eric Lindquist, *Wisconsin Girl Scouts' crash death puts spotlights on dangers of 'huffing'*, Twin Cities Pioneer Press, November 22, 2018, https://www.twincities.com/2018/11/22/wisconsin-girl-scouts-crash-death-puts-spotlights-on-dangers-of-huffing/ (In discussing a Chippewa Falls, Wisconsin case involving a hazardous inhalant impaired driver who killed three Girl Scouts and a mother as they were picking up trash along a county highway, noting that chemical evidence of "huffing" volatile substances only stays in the user's system for a short time.).

Driving is a complex task which involves coordination, reaction time, tracking, judgment, divided attention, and perception. Kerrigan at 3. Drugs which impact mental or physical processes can impair the ability to safely operate a motor vehicle.

Prosecuting drug impaired drivers is a daunting task. *Id.* at v. Drugs are often used in combination with alcohol or other drugs, and precisely diagnosing drug related impairment can be far more complicated than alcohol related impairment because different drugs and drug combinations have different signs and symptoms. *Id.* at 5. Police officers may observe clear impairment, but determining what drug, drug combination, or drug and alcohol combination a drug impaired driving suspect is under the influence of, is challenging without a timely blood test.

Drug classes include depressants, stimulants, opioids (narcotics), or hallucinogens. These classes can be further subdivided, based upon the intended use of the drug. *Id.* at 11. Different drugs and drug combinations (including alcohol) have different signs and symptoms. *Id.* at 12, 23-25 (noting a variety of different signs and symptoms for various drugs). For example, some drugs such as depressants slow reflexes and slur speech similar to alcohol, while some drugs such as stimulants increase blood pressure and excitation. *Id.* The increased and prevalent use of alcohol in combination with other drugs, along with the fact that many drugs share signs and symptoms with alcohol, creates additional challenges for impaired driving

investigation and prosecution, particularly without timely blood draws. *See* Kerrigan at 4.

Some drugs have the potential to impair driving performance for extended periods, while others may impair during the "crash" phase, during which time an individual's drug concentration may be decreasing or very low. *Id.* at 4.

Different drugs and drug combinations, as well as hazardous inhalants or volatile substances, may involve different absorption, distribution, metabolism, and elimination in the human body. *Id.* at 11-20. Alcohol is typically eliminated from the human body in a *linear* rate which means that the body eliminates it at a relatively constant amount per unit of time. *Id.* at 16. Conversely, most drugs are eliminated in a *non-linear* rate, and are thus characterized by a variable half-life which makes it extremely difficult to extrapolate backwards from a known drug concentration to some earlier time and concentration. *Id.*

Toxicologists testifying about the effects of drugs on a particular individual often adopt a multi-strategy approach to interpretation. *Id.* at 13. Analytical test results demonstrating the presence and quantity of a drug or its metabolite in a biological sample are critically important, and often need to be supplemented by performance on psychophysical tests, values obtained in physiological assessments, unusual behaviors, statements, and other observations. *Id.* at 8.

The gold standard in testing drivers for drugs is a blood test. Allenman at 123. Blood tests are very

reliable because they reflect recent use and indicate which drugs are circulating in the body at the time the blood is drawn. Allenman at 123. The closer blood is withdrawn to the time of driving, the greater the interpretative value the test result will have. Kerrigan at 33. Blood tests are currently the least intrusive reliable method of testing what drugs are in an impaired driving suspect's body at the time of driving. *Id.* at 33-37.

Any rule that delays law enforcement's ability to obtain a blood sample leads to evidence destruction. Delays in obtaining drug related evidence are especially problematic because most drugs are not eliminated from the human body at a linear rate which makes it difficult to extrapolate backwards and estimate drug concentration at the time of driving. In some cases, delays in obtaining a blood test can result in the complete destruction of relevant drug related evidence.

The Chippewa Falls case referenced above is instructive on the potential harm caused by delays drawing blood. *See* Lindquist. The defendant "huffed" hazardous inhalants/volatile substances, became disoriented, and drove off the road killing three Girl Scouts and one mother. Because hazardous inhalant evidence and hazardous inhalant impairment can disappear so quickly, any delay in drawing the defendant's blood could lead to destroying all evidence of hazardous inhalants in the blood stream. Fortunately, after leaving the scene of the accident, the defendant's passenger admitted he and the driver were impaired due to hazardous inhalants, and the defendant eventually

admitted the same. Law enforcement should not have to depend exclusively on confessions to bring impaired drivers to justice. Conversely, timely blood draws give defendants the best evidence to defend themselves.

Adopting a per se rule recognizes it is not always possible for law enforcement officers observing impairment to distinguish between alcohol impairment and impairment based on a combination of alcohol and drugs, particularly in cases involving unconscious impaired driving suspects. Observing an odor of intoxicants, slurred speech, and other standard alcohol indicia of impairment does not rule out the possibility of drug use in combination with alcohol. The natural dissipation of drugs, the unpredictable nature of that dissipation, and the challenging nature of drug impaired driving prosecution without precise drug concentrations at the time of driving, constitutes a categorical exigency resulting in an exception to the warrant requirement.

C. A decision in favor of Mitchell may impact civil impaired driving cases.

A decision in favor of Mitchell may negatively impact civil impaired driving cases. In Wisconsin most first offense impaired driving violations are charged as a civil forfeiture similar to a traffic ticket, an approach Justice Blackmun criticized in a concurring opinion issued in 1984. *See Welsh v. Wisconsin*, 466 U.S. 740, 755-56, 104 S.Ct. 2091 (1984) (Blackmun, J., concurring) (comparing Wisconsin's decision to charge first offense

OWI violations as a civil violation to an "indulgent parent" hesitating to "discipline the spoiled child"). The Wisconsin legislature crafted an approach which requires ignition interlock devices for OWI cases involving high blood alcohol concentration cases and repeat OWI convictions, requires alcohol or drug abuse assessments and other addiction resources, quickly imposes administrative penalties, and carries significant jail and prison sentences for repeat offenders. While reasonable minds may disagree on the best legislative approach to this serious problem, the Court should be mindful of the impact a decision in this case may have on Wisconsin civil OWI cases.

A decision which precludes warrantless blood draws of unconscious OWI suspects will likely result in unconscious civil OWI defendants challenging the validity of (civil) blood draw warrants. Unconscious drivers will likely assert that the intrusion of a blood draw for a civil traffic citation contradicts constitutional principles. Wis. Stat. § 968.13 permits blood draw warrants for civil OWI offenses, but the validity of search warrants in the civil context is complicated, and will likely invite further litigation. *See Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967) (discussing when warrantless searches authorized by law are consistent with Fourth Amendment requirements).

After the Court issued the *McNeely* decision, most Wisconsin communities stopped applying for blood draw warrants on civil OWI cases in part to avoid creating more impaired driving litigation, especially

because a civil refusal charge constitutes an OWI conviction.

The Court should consider how a decision in favor of Mitchell might impact civil OWI enforcement in Wisconsin. If warrantless blood draws of unconscious drivers are not permissible, and blood draw warrants are unavailable for civil OWI offenses, Wisconsin will not be able to obtain blood evidence for unconscious civil OWI defendants. Regardless of whether these challenges are successful, they will likely lead to more impaired driving related litigation.

CONCLUSION

For the foregoing reasons, the judgment of the Wisconsin Supreme Court should be affirmed.

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No. 18-6210

IN THE

Supreme Court of the United States

GERALD P. MITCHELL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Writ of Certiorari
To the Supreme Court of Wisconsin

BRIEF OF MOTHERS AGAINST DRUNK DRIVING AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

In a State with an implied-consent statute for intoxicated motorists, is a warrantless blood draw of an unconscious driver for whom police have probable cause of operating under the influence an unlawful search under the Fourth Amendment?

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INTEREST OF *AMICUS CURIAE*[1]

MADD was founded in May 1980. Its mission is to end drunk driving, help fight drugged driving, support the victims of these violent crimes, and prevent underage drinking. In pursuit of those objectives, MADD participates actively in public and private studies, legislative initiatives, and law-enforcement programs aimed at reducing the incidence of alcohol-related roadway tragedies. MADD is one of the largest victim-services organizations in the United States, and since its founding, drunk driving deaths have fallen by 50%.

In 2006, MADD launched a new "Campaign to Eliminate Drunk Driving." One of the key aspects of this campaign is supporting law enforcement in their efforts to catch drunk drivers, keep them off the road, and discourage others from driving while under the influence of alcohol or other intoxicants. The strict and swift enforcement of drunk driving laws, through arrest and prosecution, is essential to that effort. MADD supports law enforcement's use of all constitutionally permissible tools to prevent drunk driving. Some of the most effective enforcement tools are blood alcohol concentration ("BAC") tests, to which drivers in all United States jurisdictions impliedly consent when receiving driver's licenses.

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[1] Pursuant to this Court's Rule 37.3(a), both parties submitted letters to the Clerk granting blanket consent to *amicus curiae* briefs. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

MADD is concerned that a reversal of the Wisconsin Supreme Court's decision in this case will impose an unnecessary restriction on law enforcement's ability to gather reliable, admissible BAC evidence with respect to a particularly dangerous class of drunk drivers: those who choose to get behind the wheel even though they have consumed so much alcohol that they risk losing consciousness. These offenders pose an even greater threat to public safety than the average intoxicated driver, and, when these drivers actually do lose consciousness, a blood test is the only means to gather reliable evidence to secure a conviction for driving under the influence and to protect the public. Imposing a default warrant requirement would not only serve little purpose in these circumstances, but would also hamper effective law enforcement, since these offenders often require medical treatment as a result of their elevated BAC and/or a crash they have caused, and, because they may fall in and out of consciousness, it may not always be simple to determine when a warrant is necessary and when a warrantless blood draw would be justified.

SUMMARY OF ARGUMENT

To hold drunk drivers accountable—and to prevent further deaths and debilitating injuries—States must be able to expediently gather accurate and admissible evidence related to the crime, including the driver's BAC at or near the time of the crash. Those mandates become even more compelling in the case of a particularly dangerous (but all-too-common) class of drunk drivers: those who become unconscious after having first taken the wheel.

In this case, the Wisconsin Supreme Court correctly held that a warrantless blood test of a then-

unconscious drunk driver, Gerald Mitchell, did not violate the Fourth Amendment because Mr. Mitchell validly consented to the blood test by driving a motor vehicle while intoxicated on a public road in Wisconsin. Such conduct readily satisfies Wisconsin's implied consent law, and should be deemed the equivalent of actual consent for the reasons argued by the State. That alone is enough to rule in the State's favor and affirm the Wisconsin Supreme Court's decision. But MADD submits that even if Mr. Mitchell had not provided actual consent, the warrantless blood test of Mr. Mitchell in this case was constitutional because under the totality of the circumstances, as a matter of law, the blood draw was a reasonable search. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995) ("the ultimate measure of the constitutionality of a governmental search is [its] 'reasonableness'"). Drunk drivers who become unconscious are categorically more dangerous than conscious ones, have categorically weaker privacy interests, and, in every case, there is no less invasive alternative to gather the evidence law enforcement needs to prosecute them and deter other would-be drunk drivers. These categorical differences call for a categorical rule permitting warrantless blood draws, in a medical setting, for this limited class of persons in the limited circumstances covered by the statute. Such a rule is entirely consistent with this Court's precedents and is not vulnerable to abuse. Any other rule will create chaos and uncertainty for law enforcement, and would perversely provide greater protections to those individuals whose own choices and conduct put innocent lives at risk.

For this reason, and for those argued by the State, MADD respectfully asks the Court to affirm the Wisconsin Supreme Court's decision.

ARGUMENT

I. A WARRANTLESS BLOOD DRAW IS A REASONABLE SEARCH

Courts have long held that a blood draw constitutes a search under the Fourth Amendment. *See Schmerber v. California*, 384 U.S. 757, 770 (1966). Whether such a search is constitutional—even without a warrant—depends on whether it is "reasonable." *Maryland v. King*, 569 U.S. 435, 447 (2013).

Where "there was no clear practice[] either approving or disapproving the type of search at issue[] at the time the [Fourth Amendment] was enacted, whether a particular search meets the reasonableness standard is judged by balancing the intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53 (1995). This is a case-specific analysis, rather than a "per se rule of unreasonableness," *King*, 569 U.S. at 448, because "[t]he Fourth Amendment does not require that every search be made pursuant to a warrant. . . . The relevant test is not the reasonableness of the opportunity to procure a warrant, but the reasonableness of the seizure under all the circumstances." *South Dakota v. Opperman*, 428 U.S. 364, 372–73 (1976).

In keeping with those principles, this Court has applied a broad balancing approach to Fourth Amendment searches in a range of contexts. *See King*, 569 U.S. at 448 (cheek swabs); *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999) (search of passenger belongings in car); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 450 (1990) (suspicionless drunk driving checkpoints); *Vernonia*, 515 U.S.

at 652–53 (random drug testing of students' urine); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619–33 (1989) (testing of bodily fluids from certain railroad employees).

While the reasonableness inquiry has many facets, "special law enforcement needs," "minimal [bodily] intrusions," "diminished expectations of privacy," *King*, 569 U.S. at 447, the lack of less-invasive alternatives, *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2184 (2016), and the difficulties in securing a warrant all play a role, *Schmerber*, 384 U.S. at 771. Collectively, these factors support a finding—whether under the actual consent exception, the search-incident-to-arrest exception, or under a broader reasonableness analysis—that the warrantless blood draw here was "reasonable" and therefore constitutionally permissible.

A. States Must Be Able To Protect The Public From Individuals Who Drink, Drive, And Become Unconscious

1. This Court has for decades confirmed that a State's interest in combatting drunk driving is very great indeed. *See, e.g.*, *Birchfield*, 136 S. Ct. at 2178–79; *Missouri v. McNeely*, 569 U.S. 141, 159–60 (2013); *Sitz*, 496 U.S. at 451; *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957). Despite the "progress [that] has been made" in combatting drunk driving, *McNeely*, 569 U.S. at 160, States continue to have a "'paramount interest . . . in preserving the safety of . . . public highways,'" and "in creating effective 'deterrent[s] to drunken driving,'" which remains "a leading cause of traffic fatalities and injuries," *Birchfield*, 136 S. Ct. at 2178–79 (quoting *Mackey v. Montrym*, 443 U.S. 1, 17, 18 (1979)). In light of this compelling interest, this Court often upholds "anti-

drunk-driving policies that might be constitutionally problematic in other, less exigent circumstances." *Virginia v. Harris*, 130 S. Ct. 10, 11 (2009) (Roberts, C.J., dissenting from denial of certiorari).

In furtherance of those interests, States, including Wisconsin, have rigorously enforced drunk driving laws by making arrests and obtaining convictions. These enforcement efforts take drunk drivers off the road, deter would-be drunk drivers,[2] reduce recidivism,[3] and encourage offenders to get treatment.[4] *See Indianapolis v. Edmond*, 531 U.S. 32, 37–38 (2000) (noting that in the Fourth Amendment context, the Court has upheld government measures "aimed at removing drunk drivers from the road").

2. The State's interest in protecting the public from drunk driving is heightened in cases where law enforcement officers encounter offenders who have either consumed so much alcohol that they have lost consciousness while driving, or who have become unconscious as a result of a drunk-driving crash—regrettably, an all-too-common occurrence.

By way of example, the median alcohol concentration for 2015 OWI citations in Wisconsin (the most recent year for which data is available) was

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[2] Benjamin Hansen, *Punishment and Deterrence: Evidence from Drunk Driving*, 105 Am. Econ. Rev. 1581, 1582 (2015).

[3] D. Paul Moberg & Daphne Kuo, *Five Year Recidivism after Arrest for Operating While Intoxicated: A Large-scale Cohort Study*, Univ. of Wis. Population Health Inst., 4–6 (Apr. 2017), http://tinyurl.com/y28cefwu.

[4] Elisabeth Wells-Parker et al., *Final results from a meta-analysis of remedial interventions with drink/drive offenders*, 90 Addiction 907, 907–26 (1995).

0.16%,[5] meaning that more than half of those cited had a BAC more than twice the legal limit and beyond the threshold at which intoxicated individuals may begin to lose consciousness.[6] Further, nearly 80% of Wisconsin's alcohol-impaired driving fatalities in 2017 involved drivers with BAC levels of 0.15% or above, while almost 60% of the 10,874 alcohol-impaired traffic fatalities nationwide were caused by drivers with a BAC of 0.15% or higher.[7]

Anecdotal evidence also supports the view that drunk driving by persons who may lose consciousness due to alcohol is a serious law enforcement and public health issue. The majority of States (at least 29) have passed legislation specifically addressing how law enforcement ought to deal with suspected drunk drivers who have become unconscious.[8] And

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[5] *See Drunk Driving Arrests and Convictions*, Wis. Dep't of Transp., https://tinyurl.com/yxq9esoc (last visited Apr. 2, 2019).

[6] *Understanding the Dangers of Alcohol Overdose*, Nat'l Inst. on Alcohol Abuse and Alcoholism, 3 (Oct. 2018), https://tinyurl.com/yyg3pm86.

[7] *2017 State of Drunk Driving Fatalities in America*, Foundation for Advancing Alcohol Responsibility, http://tinyurl.com/y5bxcjek (last visited Apr. 2, 2019).

[8] Ala. Code 1975 § 32-5-192(b); Alaska Stat. § 28.35.035(b); Ariz. Rev. Stat. Ann. § 28-1321(c); Ark. Code Ann. § 5-65-202(b); Cal. Veh. Code § 23612(a)(5); Colo. Rev. Stat. § 42-4-1301.1(8); Fla. Stat. § 316.1932(1)(c); Ga. Code Ann. § 40-5-55(b); 625 Ill. Comp. Stat. § 5/11-501.1(b); Iowa Code § 321J.7; Ky. Rev. Stat. Ann. § 189A.103(2); La. Rev. Stat. Ann. § 32:661(B); Md. Code Ann., Cts. & Jud. Proc. § 10-305(c); Mo. Rev. Stat. § 577.033; Mont. Code Ann. § 61-8-402(3); Nev. Rev. Stat. § 484C.160(3); N.H. Rev. Stat. Ann. § 265-A:13; N.M. Stat. Ann. § 66-8-108; N.C. Gen. Stat. § 20-16.2(b); Ohio Rev. Code Ann. § 4511.191(4); Okla. Stat. Title 47, § 751(C); Ore. Rev. Stat. § 813.140(2)(b); S.C. Code Ann. § 56-5-2950(H); Tex. Transp. Code

appellate courts in these States have heard cases involving such drivers at least 30 times in the last three years.

For example, in *State v. Thompson*, No. 18CA9, 2018 WL 6822570 (Ohio Ct. App. Dec. 24, 2018), officers performed a warrantless blood draw on a driver found unconscious at a crash site "reek[ing] of alcohol," who remained unresponsive at the hospital. *Id.* at *2. That driver's vehicle had collided head-on with another vehicle at approximately 90 miles per hour, causing serious injuries to multiple victims, scattering debris "over two city blocks," and causing a chaotic scene which, according to the investigating officers, "'look[ed] like a bomb went off.'" *Id.* at *1–3.

In another Ohio case, *State v. Speelman*, 102 N.E.3d 1185 (Ohio Ct. App. 2017), a motorcycle driver was traveling with a passenger at 102 miles per hour late in the evening. *Id.* at 1186. The motorcycle slammed into the rear of another vehicle, ejecting and killing the passenger. *Id.* When police arrived, they found the motorcyclist "injured so severely" that he was "presumed . . . to be deceased." *Id.* He could neither communicate nor respond to commands, but smelled strongly of alcohol. *Id.* Officers observed that he had a possibly severed artery and, given the circumstances, ordered a blood draw as soon as possible. *Id.* at 1187.

Other cases involving unconscious drunk drivers—i.e., those unable to give verbal consent or with-

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[Footnote continued from previous page]

Ann. § 724.014(a); Utah Code Ann. § 41-6a-522; Vt. Stat. Ann., Title 23, § 1202(a)(2); W. Va. Code, § 17C-5-7 (a); Wis. Stat. Ann. § 343.305(3)(b); Wyo. Stat. Ann. § 31-6-102(c).

draw consent to a blood draw—confirm the real and present danger such drivers pose to the public and the challenges they pose to law enforcement. *See, e.g.*, *State v. Hayes*, No. 26379, 2016 WL 5888103 (Ohio Ct. App. Oct. 7, 2016) (warrantless blood draw taken from driver with a BAC of more than twice the legal limit who caused fatal crash and became unconscious in hospital); *State v. Howes*, 373 Wis.2d 468 (Wis. 2017) (warrantless blood draw taken from driver with multiple prior OWI convictions whose BAC exceed the legal limit and who crashed into a deer and became unconscious).

Thus, although *all* drunk drivers pose a clear and present danger to the public, the State's compelling interest in deterrence is consistently elevated in cases involving those drivers who drink so excessively that they black out, struggle to remain conscious, or fully lose consciousness behind the wheel. The reason is simple and irrefutable: a drunk driver who is barely conscious or loses consciousness due to alcohol (or another intoxicant) is certain to strike another vehicle, cyclist, pedestrian, or wildlife, or to otherwise harm him or herself.

Restricting law enforcement's ability to collect evidence in the course of arresting this discrete but particularly hazardous category of drivers will have unjust and dangerous consequences with respect to deterrence and the enforcement of drunk-driving laws. Unlike the case of a conscious drunk driver, law enforcement cannot obtain express consent from an unconscious driver and may have less time to secure a warrant in the likely event that the driver requires medical care. A rule that would make it *more* difficult for the police to apprehend a *more* danger-

ous class of drunk drivers is not one this Court should endorse.

3. Given the heightened threat that drunk drivers who are or become unconscious at the time of their arrest or shortly thereafter pose to public safety, and given the injuries and loss of life on the nation's roadways, law enforcement must have access to the *best* evidence it can lawfully obtain when investigating this violent crime—even if other evidence is available. Today's blood tests are the best evidence of a driver's BAC, and it is important to administer them quickly because the level of alcohol in the blood dissipates rapidly after drinking ceases. *Skinner*, 489 U.S. at 623 (explaining that blood samples must be obtained "as soon as possible" so as not to "result in the destruction of valuable evidence"). Obtaining a prompt and accurate reading is also important insofar as it may affect the severity of sentencing—indeed, Mr. Mitchell's BAC was past the level at which criminal penalties triple. *McNeely*, 569 U.S. at 170 ("[T]he concentration of alcohol can make a difference not only between guilt and innocence, but between different crimes and different degrees of punishment.") (Roberts, C.J., concurring); *see also, e.g.*, Wis. Stat. Ann. § 346.65(2)(g) (providing different penalties depending on BAC).[9] This Court has acknowledged and confirmed these compelling government interests by making it clear that, under the right circumstances, an arresting officer is not obligated to obtain a warrant before conducting a search incident to arrest simply because there might

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[9] 48 States and the District of Columbia also have laws imposing stricter penalties on those with elevated BAC levels. *See* note 7, *supra*, at 18.

be adequate time in the particular circumstance to do so. *See, e.g.*, *Birchfield*, 136 S. Ct. at 2186–87; *see also* Part I.D, *infra*.

Hindering law enforcement's ability to take a blood draw without a warrant under the limited circumstances present here will impede the State's fight against drunk driving and, in the immediate case, prevent enforcement of the law against unconscious drunk drivers, whom the State has a greater interest in apprehending and deterring. Moreover, the State's ability to obtain the best evidence necessary to secure convictions for drunk-driving offenses is a compelling state interest that weighs heavily against the unconscious drunk driver's diminished privacy interest, a point discussed at greater length in Part I.C.

B. There Is No Less Invasive Alternative

What makes this case different from *McNeely*—and consistent with this Court's decision in *Birchfield*—is the fact that, due to the unconscious driver's own conduct, there is simply no less invasive alternative to obtain necessary BAC evidence.

This Court has already agreed that "medically drawn blood tests are reasonable in appropriate circumstances." *McNeely*, 569 U.S. at 159; *Schmerber*, 384 U.S. at 770–72; *Skinner*, 489 U.S. at 633 (warrantless blood tests of employees justified where "the compelling Government interests served by the [regulations] . . . outweigh[ed] [employees'] privacy concerns"); *South Dakota v. Neville*, 459 U.S. 553, 559 (1983) ("*Schmerber*, then, clearly allows a State to force a person suspected of driving while intoxicated to submit to a blood alcohol test"). Consistent with *Schmerber*, *Neville*, and *Skinner*, "appropriate cir-

cumstances" always exist in the case of unconscious individuals whom the police have probable cause to arrest for drunk driving. That is because, in addition to the State's compelling interest in protecting innocent lives from drunk drivers and, in the immediate case, from drunk drivers who become unconscious, a blood test is the least invasive means of obtaining critical evidence—particularly when an unconscious drunk driver is already receiving medical attention.

This "less invasive alternative" analysis was central, if not dispositive, in *Birchfield*, which upheld warrantless breathalyzer tests as lawful under the search-incident-to-arrest doctrine. 136 S. Ct. at 2182. The Court stated that the "[r]easonableness" of a search "must be judged in light of the availability of the less invasive alternative," *id.* at 2184, and upheld the warrantless breath test because it is a relatively non-invasive means of obtaining a reading of a driver's BAC that is, in many cases, as effective as a blood test, while being superior to other more costly or less effective alternatives, such as sobriety checkpoints and ignition interlock systems. *Id.* at 2182 & n.8. But the Court also recognized that a blood test—unlike a breath test—is unique in that it "may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries." *Id.* at 2184; *see also* 2 Richard E. Erwin, Defense of Drunk Driving Cases §§ 18.01(2)(a), 18.02, 24.02(3), 24.05 (3d ed. 2017). Such a test would arguably be less invasive for an unconscious person than a conscious one because the test would be administered while the person is already receiving medical attention, and the unconscious person would not sense any pain in connection with the test.

Thus, for suspected drunk drivers found unconscious at the scene of a crash or who become unconscious thereafter, blood tests are not only a reliable means of obtaining evidence of intoxication; they are the *only* means of doing so, as breath tests are not an option. *Cf. Birchfield*, 136 S. Ct. at 2184.

C. Unconscious Drunk Drivers Have A Diminished Expectation of Privacy

In all Fourth Amendment cases, a suspected drunk driver's privacy interests must be balanced against the State's compelling public safety interests and the other circumstances identified above. Because of their choices and the nature of their crime, unconscious individuals suspected of driving drunk have even more diminished privacy interests.

As noted above, the category of unconscious suspected drunk drivers is narrow and readily identifiable. Further, this Court has ruled that individuals who choose to drive on public roadways—whether intoxicated or not—already have a diminished expectation of privacy because of the "compelling governmental need for regulation" of those roadways. *California v. Carney*, 471 U.S. 386, 392 (1985). Logically, drunk drivers who become unconscious on a public roadway and who leave decisions about their health and safety to others, including law enforcement and medical personnel, have an even weaker expectation of privacy than those who do not. *Cf. Shulman v. Group W Productions, Inc.*, 955 P.2d 469, 477 (Cal. 1996) (noting that accident victims may not have a

"reasonable expectation of privacy in the events at the accident scene itself").[10]

Therefore, and under the circumstances, the right of an unconscious drunk driver to be free of "a properly safeguarded blood test is far outweighed by the value of [such a test's] deterrent effect," as well as the other interests discussed above. *Breithaupt*, 352 U.S. at 439.

D. A Warrant Requirement Would Impose Additional Burdens With No Commensurate Benefits

While the warrant requirement is a cornerstone of Fourth Amendment jurisprudence, it is not a requirement that is reflexively applied in every case. *See* p. 4, *supra*. Under *Birchfield*, courts must consider whether such a requirement would actually provide additional protection to those suspected of drunk driving. *See Birchfield*, 136 S. Ct. at 2181–82. In the case of unconscious drunk drivers, the purposes of the warrant requirement—"ensur[ing] that a search is not carried out unless a neutral magistrate makes an independent determination that there is probable cause to believe that evidence will be found" and "limit[ing] the intrusion on privacy by specifying the scope of the search," *see id.* at 2181—would not

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[10] And in this particular case, Mr. Mitchell arguably had a diminished expectation of privacy for two further reasons: he was in police custody at the time the blood draw was taken, *see King*, 569 U.S. at 463 ("[o]nce an individual has been arrested on probable cause for a dangerous offense that may require detention before trial, his or her expectation of privacy and freedom from policy scrutiny are reduced"), and he was partaking in an activity that posed a risk to public safety, *see Skinner*, 489 U.S. at 628.

be advanced, because (1) the facts setting forth probable cause to arrest and to justify a blood draw are largely the same and consist of the officers' observations, and (2) the scope of the search is inherently limited by its nature and by the statute to drugs and alcohol. Wis. Stat. Ann. § 343.305(3)(b).

Another reason a warrant should not be required is that obtaining one is especially difficult where unconscious drunk drivers are involved. That is because such drivers often require medical attention—as was the case here, *see* J.A. 110–11—and are likely to cause significantly more delays than the typical arrest involving a conscious drunk driver. As this Court recognized in *Schmerber*, a warrantless blood draw from a conscious drunk driver is constitutional under the circumstances where a driver must be transported to a hospital and provided treatment. *Schmerber*, 384 U.S. at 770–71 ("[W]here time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant."); *McNeely*, 569 U.S. 149–52 (reaffirming *Schmerber*'s holding that it was reasonable to dispense with the warrant requirement under the circumstances). Those circumstances are almost always present in the case of an unconscious, suspected drunk driver.

While *Birchfield* suggested in passing that the warrant requirement should not be dispensed with in the case of blood tests performed on unconscious drunk drivers, it did so, in part, because the record before it provided "no reason to believe that such situations are common in drunk-driving arrests . . . ." 136 S. Ct. at 2184–85. As discussed in Part I.A, however, there is evidence that such situations are

surprisingly common and pose risks that ordinary drunk-driving arrests do not. This case presents an ideal opportunity for the Court to reconsider its statement in *Birchfield* in light of a concrete set of facts.

* * *

When the compelling state interest of protecting innocent victims on roadways is weighed against the minimal privacy interest of the offender, it becomes clear that permitting law enforcement to conduct warrantless blood tests in a medical setting on a narrow category of persons—unconscious drivers for whom police have probable cause to arrest for drunk driving—is not only reasonable, but also essential to keep our States' roadways safe, allow the States to fight drunk driving, protect innocent lives, and ensure a nation with No More Victims.

II. IMPLIED CONSENT LAWS ARE VALUABLE LAW ENFORCEMENT TOOLS THAT PROVIDE CERTAINTY AND ARE UNLIKELY TO BE ABUSED

The warrantless blood draw here was reasonable and thus constitutionally permissible. Holding otherwise, and thereby prohibiting officers from relying on section 343.305(3)(b) would not only cause chaos, but would undermine the viability of a widely-utilized, legislatively-approved remedy to a longstanding and significant public health problem.

Mr. Mitchell posits that affirming the Wisconsin Supreme Court's decision would produce a rule with "no evident limiting principle" that would be fertile ground for abuse. *See* Pet. Br. at 31. But the concern that a State could then conduct warrantless searches "in a wide range of other contexts," is unwarranted. *See id.* That is because these warrant-

less blood draws satisfy the constitutional reasonableness analysis, while Mr. Mitchell's proffered examples—e.g., that using the mail, the phone lines, or the Internet would constitute a consent to search—would not. Furthermore, Mr. Mitchell offers no examples of how *this* particular kind of statute, enacted by a majority of States, has been abused by State legislatures.

This case does not present any occasion to revisit the wisdom of implied consent laws. This Court has repeatedly recognized that such laws serve a valid and important law enforcement function and have been critical in combatting drunk driving. *See, e.g.*, *Neville*, 459 U.S. at 564; *Illinois v. Batchelder*, 463 U.S. 1112, 1118 (1983); *McNeely*, 569 U.S. at 160 (endorsing implied consent laws as "legal tools to enforce [States'] drunk driving laws"); *Birchfield*, 136 S. Ct. at 2185 (making clear that, although a State may not impose criminal penalties for refusing a blood test, the Court's holding "should [not] be read to cast doubt on" implied consent laws more generally). And since the 1970s, this Court has weighed the States' interest in protecting the public from drunk driving against the risk of abuse, and has recognized that implied consent statutes do not violate the Due Process Clause. In *Mackey v. Montrym*, for example, the Court held that Massachusetts's implied consent law, which authorized the suspension of licenses of intoxicated drivers who refused breath-analysis tests, adequately balanced the drivers' property interest with the State's compelling interest in highway safety. *Mackey*, 443 U.S. at 19. The Court acknowledged that while there could, in theory, be some risk of error or abuse by law enforcement, any such risk did not justify greater procedural protec-

tions. *Id.* at 15. That analysis applies equally to this case.

Taking the Court's precedents into account, Mr. Mitchell's proposed rule—that law enforcement cannot rely on section 343.305(3)(b) in the case of unconscious drunk drivers but must instead obtain a warrant in the ordinary case—would generate confusion and uncertainty. By way of example, in *People v. Hyde*, 393 P.3d 962 (Colo. 2017), the defendant was found at the scene of a crash, unconscious, "with blood gurgling from his mouth," but awoke en route to the hospital. *Id.* at 964–65. He then became combative, had to be sedated, and a blood draw was taken at the hospital about two hours after the crash. *Id.* at 965.

Similarly, in *McGraw v. State*, 245 So.3d 760 (Fla. Ct. App. 2018), the defendant was involved in a single car rollover crash. The fire department was attempting to extricate the defendant from his vehicle when officers arrived to find the defendant unconscious and unresponsive, but smelling strongly of alcohol. *Id.* at 762. The defendant was then transported to the hospital for treatment and a blood draw was taken, but given that his injuries were seemingly minor, an officer could reasonably have expected him to regain consciousness. *Id.*

Mr. Mitchell's proposed rule would require officers—who are often already dealing with chaotic crash scenes as well as victims and suspects in need of medical care—to predict or anticipate when a defendant might lose or regain consciousness in order to decide whether and when to take a blood draw or obtain a warrant. Such uncertainty would hamper effective law enforcement, which needs clear rules in order to be able to adapt and respond to constantly

evolving circumstances and competing interests. And indeed, this is exactly what implied consent statutes like Wisconsin's are meant to promote. Officers in such egregious cases should not have to linger in uncertainty, delaying evidence collection or otherwise facing greater obstacles to the lawful apprehension and deterrence of drunk drivers because of a defendant's fortuitous loss of consciousness.

CONCLUSION

For the reasons stated above and in Respondent's brief, the decision of the Wisconsin Supreme Court should be affirmed.

Respectfully submitted.

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In The Supreme Court of the United States

GERALD P. MITCHELL,

Petitioner,

v.

WISCONSIN,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Wisconsin

BRIEF OF THE NATIONAL COLLEGE FOR DUI DEFENSE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTERESTS OF AMICUS CURIAE[1]

Amicus curiae is the National College for DUI Defense ("NCDD").

NCDD is a nonprofit professional organization of lawyers, with over 1,400 members, focusing on issues related to the defense of persons charged with driving under the influence. Through its educational programs, its website, and its email list, the College trains lawyers to represent persons accused of drunk driving. NCDD's members have extensive experience litigating issues regarding breath, blood, and urine tests for alcohol and other drugs. NCDD has appeared as amicus curiae in several drunk driving cases before the Supreme Court of the United States.

SUMMARY OF ARGUMENT

In this brief, Amicus makes three arguments.

First, that categorical exceptions to the Fourth Amendment warrant requirement are disfavored and should be avoided. This includes legislatively deemed consent to a search of any kind.

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than Amicus and their counsel made a monetary contribution to the preparation or submission of this brief.

Second, that modern electronic warrant procedures are legal, efficient, and effective and should be encouraged. The addition of a new categorical exception to the warrant requirement is therefore unnecessary.

Third, two hundred years of precedent establishes that a state legislature does not have the power to pass a law that declares certain facts to be true such that they would operate to negate a person's individual rights arising under the U.S. Constitution. No just basis exists to depart from settled precedent in this matter.

For these reasons, this Court should reverse the decision of the Wisconsin Supreme Court

ARGUMENT

I. Categorical Exceptions To The Fourth Amendment Warrant Requirement Are Disfavored And Should Be Avoided. Per Se Exceptions Run Afoul Of The Basic Premise That Any Such Exception Should Be Based On An Individual Review Of The Totality Of Circumstances. Legislative "Deemed" Consent Is Contrary To Established Fourth Amendment Precedent.

Taking a blood sample or administering a breath test is a search governed by the Fourth Amendment. See Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 616-17, 109 S.Ct. 1402, 103 L.Ed.2d 639

(1989); Schmerber v. California, supra. Thus, in the absence of an exception, a warrant is required in order to conduct such a search.

A blood draw is a particularly intrusive search. It invades the interior of the human body and, therefore, implicates interests in human dignity and privacy. Schmerber v. California, 384 U.S. 757, 769-70 (1966). To allow a blood draw without a warrant runs counter to these significant interests and established Fourth Amendment precedent.

A number of recognized, well-delineated exceptions to the warrant requirement may, in specific circumstances, apply to a warrantless search in a DUI case. For example, in a case involving a breath test, the search incident to a lawful arrest exception applies categorically. Birchfield v. North Dakota, ___ U.S. ___, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016). For warrantless blood draws, an exigency exception may or may not apply, on a case-by-case basis. Missouri v. McNeely, 569 U.S. 141, 183, n. 3, 133 S.Ct. 1552, 1559, n. 3, 185 L.Ed.2d 696 (2013). Pp. 2173-74.

The Wisconsin statutes at question here categorically allow the warrantless search and seizure of blood from an unconscious subject, effectively creating a statutory exception to the Fourth Amendment. Amicus will address the related questions of whether categorical statutory exceptions to the Fourth Amendment are permissible, and the potential consequences that may result therefrom.

a. A State Cannot Legislatively Mandate The Waiver Of A Person's Constitutional Rights In Favor Of The State.

Both the concurring opinion and the dissenting opinions below (thus, a majority of the state Justices) correctly point out that Wis. Stat. § 343.305(3)(b) creates a statutory exception to the Fourth Amendment. "Deemed" or implied consent is not actual consent; a statute that classifies a category of ubiquitous behavior such as driving as "deeming" a waiver of a fundamental constitutional right is, at best, problematic.

The lead opinion justifies the "deemed" waiver on the basis of consent. It justifies the doctrine of "deemed" waiver by reference to administrative searches of pervasively regulated areas, per Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970). This justification, however, does not fit. As Justice Kelly stated, the lead opinion misunderstood the nature of administrative searches under Colonnade. Administrative searches are not based on consent and the presence of pervasive governmental regulation. Rather, administrative searches under Colonnade are based on the idea that such searches do not intrude on the affected person's reasonable expectation of privacy. Thus, restauranteurs have no reasonable expectation to be free from health inspections. Although driving a car is a highly regulated area, drivers still maintain a reasonable expectation of privacy in their persons; as such, the administrative search exception does not apply.

The second justification is the idea that the driver has consented, albeit impliedly as demonstrated by the mere act of driving. Implied or "deemed" consent is a legal fiction, and is not actual consent. There is no precedent that would allow a state to categorically label such ubiquitous activity as driving as an implied waiver of Fourth Amendment rights. To do so would be a radical departure from all Fourth Amendment jurisprudence. The concurrence and dissent agree that a state cannot legislatively waive the people's constitutional protections in favor of the state. Again, as Justice Kelly aptly stated in his concurrence in State v. Brar, 898 N.W.2d 499 (Wis. 2017): "It is a metaphysical impossibility for a driver to freely and voluntarily give consent implied by law. This is necessarily so because 'consent' implied by law isn't given by the driver."

The lead opinion wrongly conflates three concepts: express consent, consent implied by conduct, and consent deemed by law. Express consent is, of course, nonproblematic, provided it is voluntarily and intelligently given. Consent by conduct is determined on a case-by-case basis, and is essentially non-verbal, but nevertheless remains express consent.

Consent implied by law, however, or waiver of a constitutional right as dictated by law, cannot actually be voluntary, as the consent is not given by the subject. Rather, it is a legal fiction that is premised upon the subject driving a car, rather than an actual exchange between the police officer and the citizen. Rather, the lead opinion below permits the state to bypass the well-established and constitutionally required

consideration of a totality of circumstances review when evaluating the subject's waiver of rights. The Wisconsin implied consent statute attempts to create a per se exception to the warrant requirement. Such categorical consent is, by definition, not individualized.

In McNeely, the Court declared that "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." 569 U.S. 141, 156 (2013). A case-by-case determination, rather than a categorical exception is required.

"But it does not follow that we should depart from careful case-by-case assessment of exigency and adopt the categorical rule proposed by the State and its amici. In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so."

McNeely, supra, 569 U.S. at 152, 133 S.Ct. at 1561.

The Court implied such an application of McNeely in Aviles v. Texas, 571 U.S. 1119 (2014). In Aviles, the Court vacated a Texas judgment based on implied consent derived through the Texas implied consent law. 571 U.S. 1119 (2014). The Court remanded Aviles for further consideration in light of McNeely. McNeely, Birchfield, and Aviles all support the proposition that reliance on an implied consent statute to provide "actual" consent to a Fourth Amendment search violates McNeely's requirement that each blood draw in a

drunk driving case be analyzed on a case-by-case basis. Statutorily "deemed" consent is a particularly pernicious doctrine that has never been held by this Court to replace actual consent.

It must then be asked if consent is "deemed" in the case of every driver who has been arrested for DUI, what need is there for a warrant in any case? What becomes of the holding of McNeely requiring warrants except in exigent circumstances? Why should any legislature allow a subject the option to withdraw the implied consent?

Since statutory "implied consent" schemes are misnomers, these are not difficult questions to answer. The legal fiction of implied consent providing actual consent is misconstrued. These statutes are better characterized as administrative sanctions rather than implied consent. In other words, a state may permissibly impose a civil penalty structure for refusal to submit to a blood draw, but they cannot statutorily mandate a waiver of the right to refuse to consent to the blood draw.

b. The "Deemed" Consent Doctrine, As An Exception To The Warrant Requirement, Is Particularly Conducive To State Abuse, As It Invites Extension Into Other Areas, And Lacks Any Internal Limiting Concept.

If driving a car provides consent for a search of one's body, the question then necessarily becomes what

other similarly ubiquitous behavior may be deemed to constitute consent to a search? The implied consent doctrine, as so interpreted, is inherently problematic, because, as Justice Kelly again pointed out, it lacks any internal limiting concept:

> Nor is there anything about this new doctrine that necessarily limits it to the context of obtaining blood tests from intoxicated drivers. There are certain parts of the State that experience a disproportionate amount of crime. Perhaps the legislature might decide (that the) police need greater access to homes and other buildings in the area. It could, according to our opinion today, adopt an "implied consent" statute in which recording a property deed comprises consent to search of one's property when the police have probable cause to believe the owner has been involved in a crime. It takes very little imagination to see how this new doctrine could eat its way through all of our constitutional rights.
>
> Brar, supra, par. 84.

If the implied consent scheme at question here is upheld, then it is not difficult to see that a state could enact laws deeming virtually any conduct as binding (albeit fictitious) consent to a waiver of the right to refuse to consent to a search. If the lead opinion is correct in this case, we must ask, why not? A state could, for example, enact a statute mandating that entry into an establishment that sells alcoholic beverages, attendance at a sporting event, or a stroll in a public park could be deemed consent to a breath or blood test. If a

state could do those things, a state could also define areas as "high crime" and mandate that any person walking in the area has consented to a search of his or her person or effects.

These and other more disturbing examples may be speculative, and the likelihood of such occurrences can be debated. However, no speculation is necessary to see a frightening example of state overreach based on "deemed" consent. Indeed, this Court need only look at a different subsection of the Wisconsin implied consent statute which permits a warrantless blood draw of an unconscious person, with no actual suspicion of impairment.

Wis. Stat. § 343.305(3)(ar)2 states (emphasis added):

> If a person is the operator of a vehicle that is involved in an accident that causes the death of or great bodily harm to any person and the law enforcement officer has reason to believe that ***the person violated any state or local traffic law***, the officer may request the operator to provide one or more samples of his or her breath, blood, or urine for the purpose specified under sub. (2). Compliance with a request for one type of sample does not bar a subsequent request for a different type of sample. ***A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subdivision and one or more samples specified in par. (a) or (am) may be administered to the person. If a person refuses to take a test under this subdivision, he or she may be arrested under par. (a).***

This subsection of the Wisconsin implied consent statute is triggered if there is an accident resulting in death or great bodily harm to any person. A law enforcement officer need only have reason to believe that the subject has violated any state or local traffic law for the statute to be triggered. The violation need not even be a moving violation. It is enough that the subject drove with a faulty taillight or expired registration. In that event, with not even a scintilla of evidence that the driver committed a moving violation, was at fault for the accident, or was impaired in any way, the police may draw blood from an unconscious subject (whose consent is implied, or whose waiver of constitutional protection is statutorily deemed). Under Respondent's doctrine, the police may seize blood from an unconscious person under such circumstances as a categorical exception to the warrant requirement, even when there is no probable cause for the issuance of a warrant.

Since Wisconsin has already jettisoned the probable cause requirement for any search pursuant to the "deemed" consent doctrine, we can now see that Justice Kelly's warning actually understated the danger to the edifice of constitutional rights. If legislatively-created exceptions to the warrant process are approved here, there is no workable test that could be fashioned to prevent more exceptions from being created by zealous politicians who often respond to the needs of special interest groups. Just as it takes little imagination to

see a home search based on living in a certain neighborhood, we can see other areas where this pernicious doctrine would metastasize. The right to be free of unreasonable search or seizure is not the only right at risk. Easy extensions of the doctrine would be "deemed" consent to forfeiture of property in the event of, e.g., a drug arrest, or the institution of suspicionless stop and frisks in high crime areas based on more presence alone.

None of these examples are the least bit farfetched. All of them are based on existing pressure from various interest groups that lobby legislative bodies. There is no way to erect cohesive limitations on the ill-conceived doctrine of "deemed" consent to the waiver of constitutional rights. Rather, we should see the "implied consent" laws for what they really are: laws that simply impose permissible administrative penalties for refusal, but do not provide a mandatory waiver of Fourth Amendment protections in favor of the State that allow the police to bypass the warrant requirement.

II. Over Forty-Five States Have Instituted E-Warrant Procedures Allowing Electronic Warrants To Be Completed In Minutes. If Actual Consent Cannot Be Gained, Legislated Consent Is Unnecessary Because The Warrant Process Works Efficiently.

a. The Availability Of An Electronic Warrant Process Is Relevant To Determining Whether A Per Se Rule Is Overbroad.

Supreme Court cases have historically recognized that the warrant requirement is "an important working part of our machinery of government," not merely "an inconvenience to be somehow 'weighed' against the claims of police efficiency." Coolidge v. New Hampshire, 403 U.S. 443, 481, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). In Riley v. California, 134 S.Ct. 2473, 2493, 189 L.Ed.2d 430 (2014) the court noted that recent technological advances have made the process of obtaining a warrant itself more efficient, thus reducing the number of incidents where lack of obtaining a warrant can be constitutionally excused.

In Missouri v. McNeely this court stated that:

> In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment **mandates** that they do so. Missouri v. McNeely, 569 U.S. 141, 152, 133 S.Ct. 1552, 1561, 185 L.Ed.2d 696 (2013) (emphasis added).

The Court in *McNeely* noted that the use of electronic warrant process (or "e-Warrants") was prevalent, and it determined that the need to create additional exceptions to the Fourth Amendment warrant requirement was unnecessary:

> Well over a majority of States allow police officers or prosecutors to apply for search warrants remotely through various means, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing. And in addition to technology-based developments, jurisdictions have found other ways to streamline the warrant process, such as by using standard-form warrant applications for drunk-driving investigations.
>
> We by no means claim that telecommunications innovations have, will, or should eliminate all delay from the warrant-application process. * * * But technological developments that enable police officers to secure warrants more quickly, and do so without undermining the neutral magistrate judge's essential role as a check on police discretion, are relevant to an assessment of exigency. That is particularly so in this context, where BAC evidence is lost gradually and relatively predictably.
>
> Missouri v. McNeely, 569 U.S. 141, 154-55, 133 S.Ct. 1552, 1562-63, 185 L.Ed.2d 696 (2013) (footnotes omitted).

b. The Electronic Warrant Process Is Now Available In Virtually Every State, Rendering This Legislatively Created Per Se Rule Overbroad.

Since McNeely was decided in 2013, the number of states that now include language (either in legislation or in court rules) allowing the issuance of warrants based on telephonic, video, or electronic affidavits has grown from a simple majority to at least forty-five. *Improving DUI System Efficiency: A Guide to Implementing Electronic Warrants* Justice Management Institute, Executive Summary p. ii (https://www.responsibility.org/wp-content/uploads/2018/04/FAAR_3715-eWarrants-Interactive-PDF_V-4.pdf?pdf=eWarrants_Implementation_Guide) (last accessed February 9, 2019). Although Delaware, Connecticut, Massachusetts, Mississippi, Rhode Island, and West Virginia have no legislation or court rule/order governing eWarrants, the lack thereof does not necessarily mean that eWarrants are not permissible, just that there is no explicit reference to the use of electronic means for transmission. The statute in the State of Delaware, for example, simply states that a warrant application must be in writing and signed, but does not specify requirements for the transmission or return of warrants.

In response to this Court's ruling in Birchfield v. North Dakota, upholding the warrant requirement for blood-alcohol testing, Arkansas judges and police began using electronic warrants. Four iPads were given to judges in Washington County, Arkansas. "What really sparked action," District Judge Casey Jones said, "was the U.S. Supreme Court ruling in June 2016 on

the Birchfield v. North Dakota case." *Washington County Search Warrants Catch Up With Digital Age*, Arkansas Democratic Gazette, July 31, 2017 https://www.arkansasonline.com/news/2017/jul/31/washington-county-search-warrants-catch/. This report noted that Jones took testimony over the phone and signed the warrant electronically, shortening an hours-long process to less than 30 minutes. "With the availability of technology, lengthy and time-consuming processes for obtaining search warrants are becoming an anachronism." *Improving DUI System Efficiency: A Guide to Implementing Electronic Warrants Justice Management Institute, Introduction p. 3* (https://www.responsibility.org/wp-content/uploads/2018/04/FAAR_3715-eWarrants-Interactive-PDF_V-4.pdf?pdf=eWarrants_Implementation_Guide) (last accessed February 9, 2019).

The time between applying for a warrant and receiving judicial approval has dropped from 30-60 minutes for paper warrants, to seconds or minutes. A January 14, 2018 article in the Salt Lake Tribune reviewed all 8,400 warrants issued in a 12-month period starting April 2016. One warrant to search was issued in 38 seconds from the time it was electronically requested. Another was issued in 48 seconds. Over one-half were issued in less than 10 minutes. Approximately twenty-five percent of the warrant applications involved DUI cases. But roughly two percent of warrant applications were denied. https://www.sltrib.com/news/2018/01/14/warrants-approved-in-just-minutes-are-utah-judges-really-reading-them-before-signing-off/ (last accessed February 9, 2019). Put another way, if a

legislative consent statute had been put into place in Utah excusing the warrant process, approximately 150 persons that were previously protected under the Fourth Amendment might have been subjected to an otherwise illegal search.

c. The Use Of The Electronic Warrant Process Will Increase The Conviction Rate.

Where e-warrant processes have been instituted, it is reported that DUI conviction rates have increased:

> "In my jurisdiction, we have a 95% conviction rate in DUI cases, in part because defense attorneys are now advising that people submit to the breathalyzer test rather than face a search warrant for a blood draw."—Warren Diepraam, District Attorney, Waller County, Texas, *Improving DUI System Efficiency: A Guide to Implementing Electronic Warrants Justice Management Institute, Introduction p. 2* (https://www.responsibility.org/wp-content/uploads/2018/04/FAAR_3715-eWarrants-Interactive-PDF_V-4.pdf?pdf=eWarrants_Implementation_Guide) (last accessed February 9, 2019).

The use of e-warrants has also reduced the time to perform certain functions associated with a DUI arrest and has increased the efficiency of police officers:

> "Processing a DUI arrest can be time consuming, taking the officer off of the street. eWarrants that can be completed in patrol cars allow the officer to obtain search warrants quickly, often within a few minutes, and reduce the time required to complete

the arrest." – Chief Steven Casstevens, Buffalo Grove, Illinois Police Department, *Improving DUI System Efficiency: A Guide to Implementing Electronic Warrants Justice Management Institute, Introduction p. 2* (https://www.responsibility.org/wp-content/uploads/2018/04/FAAR_3715-eWarrants-Interactive-PDF_V-4.pdf?pdf=eWarrants_Implementation_Guide) (last accessed February 9, 2019).

"In Minnesota, with paper warrants, the error rate on DWI forms was approximately 30%, but with eDWI processing, that rate has now dropped to almost 0%."—Kent Therkelsen, Product Manager, Bureau of Criminal Apprehension, St. Paul, Minnesota, *Improving DUI System Efficiency: A Guide to Implementing Electronic Warrants Justice Management Institute, Introduction p. 2* (https://www.responsibility.org/wp-content/uploads/2018/04/FAAR_3715-eWarrants-Interactive-PDF_V-4.pdf?pdf=eWarrants_Implementation_Guide) (last accessed February 9, 2019).

d. Law Enforcement Supports The Use Of The Electronic Warrant Process.

In November 2018, the International Association of Chiefs of Police passed a resolution praising the successes of the e-warrant process in DUI cases. It reads in pertinent part:

WHEREAS, the establishment and implementation of electronic warrant (eWarrant) programs to compel blood draws or samples of other bodily fluids have proven timely and successful in several

jurisdictions (Responsibility.org, A Guide to Implementing Electronic Warrants, 2018), utilizing a variety of systems, from simple PDF documents to web-based systems to quickly and accurately obtain evidence in the violent crime of impaired driving, and

WHEREAS, in recognition of the technology available to law enforcement agencies across the country, Responsibility.org's study and collaboration with the Justice Management Institute clearly identifies a spectrum of eWarrant systems that can assist jurisdictions in their fight against impaired driving; including recommended legislative framework, planning and design, partner engagement, funding, policy and operations, and metrics to assess goals, and

RESOLVED, that the IACP supports the development, implementation, and legislative engagement of eWarrant systems by law enforcement agencies and prosecutors to prevent injury and death on our nation's roadways.

https://www.theiacp.org/sites/default/files/View%20the%20recently%20adopted%202018%20Resolutions.pdf?utm_source=Informz&utm_medium=email&utm_campaign=Informz%20Email (last accessed February 9, 2019).

In Arizona, the pilot program started in 2012 for e-warrants was so successful that in July 2018 state leaders announced that the program will be expanded statewide. "Within eight minutes to ten minutes here's the search warrant electronically," said Alberto Gutier, the director of The Governor's Office of Highway

Safety. *"Instant search warrants coming for Arizona police departments as soon as August"* ABC15 Arizona July 23, 2018 https://www.abc15.com/news/ roads/ instant-search-warrants-coming-for-arizona-police-departments-as-soon-as-august (last accessed February 9, 2019).

To summarize, the need to circumvent the warrant process by legislatively-deemed consent is non-existent. The use of the eWarrant process is prevalent throughout the United States and this fact alone establishes that legislatively-created, wholesale exceptions to the warrant process are unnecessary and therefore unconstitutional.

III. Two Hundred Years Of Supreme Court Precedence Weigh Against The Concept Of Diluting An Individual's Constitutional Rights Through Legislative Enactments. Many States Have Already Rejected The Idea Of Implied Consent As A Substitute For Actual Consent. No Just Basis Exists To Depart From Settled Precedent In This Matter.

a. Any Statute In Conflict With The Constitution Is A Nullity.

It is the law of the land that any statute in conflict with the Constitution is a nullity. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210-11 (1824). A state legislature does not have the power to pass a law that declares certain facts to be true such that they would operate to negate a person's individual rights arising under the

U.S. Constitution. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-80 (1803).

When a court says that 'consent' implied by law is just as constitutionally effective as express consent, then the court says something terribly chilling. It is saying the legislature may decide when the People of Wisconsin must surrender their constitutional rights. State v. Brar, 898 N.W.2d 499, 521 (Wis. 2017) (Kelly, J., concurring).

Recently, this Court had occasion to review the history of the Fourth Amendment's protections in Carpenter v. United States, ___ U.S. ___, 138 S.Ct. 2206, 201 L.Ed.2d 507, 86 U.S.L.W. 4491 (2018). Citing to Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 29 L.Ed. 746 (1886) they said "First, that the Amendment seeks to secure 'the privacies of life' against 'arbitrary power.'" Id. 138 S.Ct. at 2214.

The citation to Boyd v. United States is meaningful within the context of this case for a couple of reasons. First, the case was decided in 1886. Petitioners and Amicus are not raising new and novel issues. The rule that a statute cannot infringe upon basic Constitutional protections has been around a while. Second, in Boyd, the Defendants challenged the constitutionality of an act of Congress that compelled them to produce a certain invoice to be used by the district attorney to prosecute them for fraud. The Court held the Act unconstitutional and reversed the Defendant's convictions.

Later, in Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979), the Court considered the constitutionality of an Illinois statute that allowed the search of any person located on the premises that was subject to a valid search warrant. The Court held the statute unconstitutional.

It is true that the police possessed a warrant based on probable cause to search the tavern in which Ybarra happened to be at the time the warrant was executed. But, a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Sibron v. New York, 392 U.S. 40, 62-63, 88 S.Ct. 1889, 1902, 20 L.Ed.2d 917 (1968). Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth and Fourteenth Amendments protect the "legitimate expectations of privacy" of persons, not places. See Rakas v. Illinois, 439 U.S. 128, 138-43, 148-49, 99 S.Ct. 421, 427-30, 433, 58 L.Ed.2d 387 (1978); Katz v. United States, 389 U.S. 347, 351-52, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967).

In footnote 11 the Court went on to say:

> The statute purports instead to authorize the police in some circumstances to make searches and seizures without probable cause and without search warrants. This state law, therefore, falls within the category of statutes purporting to authorize searches without probable cause, which the Court has not hesitated to hold invalid as authority for unconstitutional searches. See, e. g., Torres v. Puerto Rico, 442 U.S. 465, 99 S.Ct. 2425, 61 L.Ed.2d 1; Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596; Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917; Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040.

The Wisconsin statute in question suffers from the same constitutional infirmities as does the Act of Congress in Boyd and the state statute in Ybarra. With a broad stroke of the pen, the Wisconsin legislature has created a per se exception to the Fourth Amendment. They have legislatively allowed the exception to eviscerate the rule. By legislating blanket consent as provided by all who drive their vehicles on the roads of Wisconsin, the State has effectively said the Fourth Amendment does not apply. This cannot be right.

The traditional inquiries made to determine if an individual's consent is voluntary have been dispensed with through the statutory implied consent scheme. According to Professor LaFave, "Consent in any meaningful sense cannot be said to exist merely because a person (a) knows that an official intrusion into his

privacy is contemplated if he does a certain thing, and (b) proceeds to do that thing." 4 Wayne R. LaFave et al., Search & Seizure: A Treatise on the Fourth Amendment, s.8.2(l) at 164-65 (5th ed. 2012).

For "consent" implied by law, we ask whether the driver drove his car. And that's it. If the court is right about "consent" implied by law, then we have no interest in what the driver said, thought, experienced, felt, or saw. Nor do we need consider whether the driver acquiesced to a police officer's claim of lawful authority. We aren't interested in any personal detail about the driver, such as his age, intelligence, circumstances, or emotional state. The only thing we want to know is whether he was in the driver's seat. And that's exactly what the decision below said: "We conclude that Brar voluntarily, albeit impliedly, consented when he chose to drive on Wisconsin roads."

That single sentence comprises the entirety of the court's voluntariness analysis as it relates to "consent" implied by law. In truth, that's about as much as it could possibly have said because we really aren't interested in the driver at all when it comes to this type of consent. The driver is irrelevant to the question because he isn't the one who provided the consent—it was the legislature. As long as the driver drove, the consent inquiry ends before it begins, because the legislature provided it 48 years ago when it adopted Wis. Stat. § 343.305. There is a vast chasm separating express consent from "consent" implied by law, as this brief diversion into the voluntariness standard illustrates. In reality, they have literally nothing in

common. Which is understandable because, as discussed above, they perform entirely different functions.

State v. Brar, 898 N.W.2d 499 at 516-17 (2017) (Kelly, J., concurring).

As one can see the net effect of the implied consent law is to create a per se exception to the constitutionally required warrant requirement. This Court has rejected per se exceptions in the context of exigent circumstances in favor of using the time-honored totality of the circumstances test. Missouri v. McNeely, 569 U.S. 141, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013).

b. Many State Courts Have Already Rejected The Idea Of Legislatively-Created Consent.

The following state courts have held the simple act of driving cannot substitute for actual consent; thus unconstitutional. State v. Havatone, 389 P.3d 1251 (Ariz. 2017) (concluding that the unconscious clause can be constitutionally applied only when case-specific exigent circumstances prevent law enforcement from getting a warrant); State v. Butler, 302 P.3d 609, 613 (Ariz. 2013) (establishing that absent an exception to the warrant requirement, nonconsensual, warrantless blood draws from DUI suspects are unconstitutional); People v. Arredondo, 199 Cal. Rptr. 3d 563 (Cal. Ct. App. 2016), review granted and opinion superseded, 371 P.3d 240 (Cal. 2016); People v. Ling, 222 Cal. Rptr. 3d 463, 15 Cal. App. 5th Supp. 1 (2017); Williams v. State,

771 S.E.2d 373 (Ga. 2015) (mere compliance with statutory implied consent for blood draw for DUI suspect did not, per se, equate to actual, and therefore voluntary, consent); Bailey v. State, 790 S.E.2d 98, 104 (Ga.App. 2016) (blood draw from unconscious driver based on statute that provides the driver to have deemed not to have withdrawn his otherwise deemed consent by driving held unconstitutional), overruled on other grounds by Welbon v. State, 799 S.E.2d 793 (Ga. 2017); State v. Romano, 800 S.E.2d 644 (N.C. 2017); State v. Villarreal, 475 S.W.3d 784 (Tex. Crim. App. 2014); State v. Ruiz, 545 S.W.3d 687 (Tex.App. 2018) review granted (April 25, 2018); State v. Ryce, 396 P.3d 711 (Kan. 2017); Commonwealth v. Myers, 164 A.3d 1162 (Pa. 2017); ("Treating subsection 20-16.2(b) as an irrevocable rule of implied consent does not comport with the consent exception to the warrant requirement because such treatment does not require an analysis of the voluntariness of consent based on the totality of the circumstances."); State v. Henry, 539 S.W.3d 223, 236 (Tenn. Crim. App. 2017) ("Given the Court's reasoning in Birchfield, we can confidently conclude that Henry's warrantless blood draw pursuant to the mandatory blood draw section of the statute was not justified based on his legally implied consent."); Dortch v. State, 544 S.W.3d 518, 528 (Ark. 2018) (implied consent law held unconstitutional, holding: "While we agree that the criminal penalty imposed pursuant to Arkansas's refusal-to-consent law is much less severe than the penalties at issue in Birchfield, the plain language utilized in our statutes demonstrates that these are nonetheless criminal penalties."); State v. Fierro, 853

N.W.2d 235, 243 (S.D. 2014) (implied consent statute did not provide an exception to the search warrant requirement as relates to conscious driver); State v. Medicine, 865 N.W.2d 492, 495-500 (S.D. 2015) (statute cannot substitute for actual consent; totality of the circumstances did not show defendant freely and voluntarily consented to blood draw); State v. Won, 372 P.3d 1065, 1083-84 (Haw. 2015) (driver's consent to breath test after implied consent advisory was not voluntary); State v. Wulff, 337 P.3d 575, 581 (Idaho 2014) (concluding that "irrevocable implied consent operat[ing] as a per se rule . . . cannot fit under the consent exception because it does not always analyze the voluntariness of that consent"); Flonnory v. State, 109 A.3d 1060, 1065-66 (Del. 2015) (trial court required to perform totality of the circumstances analysis to determine if defendant voluntarily consented to the blood draw); State v. Pettijohn, 899 N.W.2d 1, 29 (Iowa 2017) (implied consent statute cannot automatically constitute effective consent to breath test under state constitution); State v. Modlin, 867 N.W.2d 609, 619 (Neb. 2015) (whether consent to search was voluntary is to be determined from the totality of the circumstances surrounding the giving of the consent); Byars v. State, 336 P.3d 939, 945-46 (Nev. 2014) (holding unconstitutional a statute that provided for use of reasonable force to take blood and that made implied consent irrevocable); State v. Baird, 386 P.3d 239, 241-42 (Wash. 2016) (implied consent statute does not authorize a search, it authorizes a choice between consenting or refusing knowing the sanctions).

The overwhelming majority of state decisions which have considered the same or a similar question as the one before this Court have held fast to the constitutional principles advanced by amicus here and rejected the use of implied consent as a synonym for voluntary consent.

c. In Conclusion, Deemed Or Implied Consent Is Not Actual Consent, Nor Should It Be.

Recalling the words of Mr. Justice Bradley:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Boyd v. United States, 116 U.S. 616, 635 (1874).

In Schneckloth, this Court rejected the per se requirement that every voluntary consent to a search be accompanied with knowledge that the subject had the

right to refuse the search. The Court said, "In sum, there is no reason for us to depart in the area of consent searches, from the traditional definition of 'voluntariness.'" Schneckloth v. Bustamonte, 412 U.S. 218, 229, 93 S.Ct. 2041, 2049, 36 L.Ed.2d 854 (1973). If a state legislature is allowed to alter over two-hundred years of constitutional protections on this issue, one can only wonder where we go from here. Justice Kelly said it best in his concurring opinion in State v. Brar, 898 N.W.2d 521-22 (Wis. 2017):

> Today the court says the legislature properly suspended Wisconsinites' Fourth Amendment rights when they go for a drive. What of their Sixth Amendment rights? Perhaps the legislature might decide it would be easier to get convictions if they also suspend the right to the effective assistance of counsel. According to our opinion today, the legislature could simply declare that driving in Wisconsin waives that right, too. Or the right not to incriminate oneself. Or the right to a jury. What principle, exactly, would prevent any of this?
>
> Nor is there anything about this new doctrine that necessarily limits it to the context of obtaining blood tests from intoxicated drivers. There are certain parts of the State that experience a disproportionate amount of crime. Perhaps the legislature might decide police need greater access to homes and other buildings in such areas. It could, according to our opinion today, adopt an "implied consent" statute in which recording a property deed comprises consent to a search of one's

property when the police have probable cause to believe the owner has been involved in a crime. It takes very little imagination to see how this new doctrine could eat its way through all of our constitutional rights.

I understand the importance of pursuing intoxicated drivers. But we are deforming our Constitution. By conferring on the legislature the authority to create consent where none exists, we are reducing constitutional rights to matters of legislative grace.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Supreme Court of the State of Wisconsin.

No legislature has the power to take away constitutional rights granted in the Constitution and interpreted by the United States Supreme Court. Based on the above, we request this Court grant the relief requested by the Petitioner and hold the Wisconsin Implied Consent law unconstitutional to the extent that

it allows the taking of the driver's blood without actual consent assuming there are no other exceptions to the warrant requirement that apply.

Respectfully submitted,

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No. 18-6210

In the Supreme Court of the United States

GERALD P. MITCHELL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF OF *AMICI CURIAE* NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

This case presents the question whether the Fourth Amendment permits implied consent laws to authorize warrantless blood draws from an unconscious impaired driving suspect. *Amici* are organizations that represent the interests of state and local governments, prosecutors, and law enforcement officers, which are the very entities and individuals that enact and enforce these laws. *Amici*'s members rely on implied consent laws like Wisconsin's to protect the public from the scourge of impaired driving. For drivers who are impaired to the point of unconsciousness or incoherence, a warrantless blood draw provides a critical tool in prosecuting and deterring the worst of the impaired driving offenses.

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the Nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on pressing issues. NCSL advocates for the interests of state governments before Congress and federal agencies,

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief. Both parties have given their consent to this filing in letters that have been lodged with the Clerk of the Court.

and regularly submits *amicus* briefs in cases, like this one, that raise issues of vital state concern.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

The National District Attorneys Association is the largest association of prosecuting attorneys in the country, representing 2,500 elected and appointed District Attorneys across the United States, as well as 40,000 Assistant District Attorneys. NDAA provides professional guidance and support, serves as a

resource and education center, and addresses criminal justice issues of national importance.

A decision holding that the implied consent laws at issue are unconstitutional would jeopardize the ability of State and local governments to enforce their public safety laws and prosecute impaired drivers. Given *amici*'s interest in effective strategies for combatting impaired driving, *amici* respectfully submit this brief in support of Respondent Wisconsin.

SUMMARY OF THE ARGUMENT

"Every day, almost 30 people in the United States die in drunk-driving crashes—that's one person every 48 minutes."[2] To curb the frightful carnage inflicted by impaired drivers barreling down public roads, all fifty State legislatures have enacted some version of implied consent laws. Most States provide that drivers impliedly consent to alcohol testing of blood, in particular, by choosing to drive. Most states also make clear that consent endures when a suspected impaired driver is unconscious or incoherent. These State legislatures have made the public policy determination that blood testing of an impaired driver will aid prosecution while lack of testing harms the ability to get convictions and achieve deterrence.

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[2] National Highway Traffic Safety Administration, U.S. Department of Transportation, *Drunk Driving*, (describing drunk-driving fatalities for 2017), https://www.nhtsa.gov/risky-driving/drunk-driving.

Proof of impairment is all the more critical when an impaired driver is unconscious. Indeed, the implied consent laws at issue promote testing of the most dangerous drivers on the road: Most drunk driving deaths are caused by drivers with twice the legal blood alcohol concentration (BAC), which is also the BAC around which blackouts may occur. Similar provisions govern testing for drug-impaired driving, which has become a leading cause of motor vehicle fatalities. When a breath test cannot be administered and speech and conduct cannot be assessed because the impaired driver is unconscious, law enforcement require other means of gathering evidence. Warrantless blood testing of these suspects avoids both jeopardizing blood evidence and delaying the unconscious driver's medical care.

These implied consent laws fall under long-standing exceptions to the Fourth Amendment's warrant requirement, including consent. State laws present a clear and reasonable trade-off. By getting behind the wheel and risking the lives of others on the road, a driver gives her consent to blood testing should law enforcement have probable cause to believe she is driving impaired. The principle of implied consent has been clearly established in State laws for over 50 years, just one of many conditions tied to the privilege of driving. Given these valid state laws and the widespread social expectations around impaired driving, reasonable drivers understand that driving impaired and then falling unconscious may result in blood testing.

No fresh consent is required when law enforcement finds the impaired driving suspect unconscious or incoherent. Petitioner's position requiring the driver to consent on the scene disregards this Court's many decisions recognizing that consent may be implicit, including through the acts of third parties. It is beyond question that consent need not be express when it is reasonably inferred from conduct. And the Court established long ago that "knowledge of a right to refuse is not a prerequisite of voluntary consent." *Schneckloth v. Bustamonte*, 412 U.S. 218, 234 (1973). Petitioner does not argue that he was forced to drive, nor that he actually withdrew his consent, so he cannot now evade the consequences of his voluntary acts.

Exigent circumstances also obviate the need for a warrant for the unconscious impaired driver. The Court in *Missouri v. McNeely* recognized that in "some circumstances . . . the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test." 569 U.S. 141, 153 (2013). *McNeely* held that exigent circumstances are not *per se* established in *all* drunk driving cases. But *McNeely* answered only that specific question—whether exigency exists in *every* drunk driving case. It was presented with no other factors indicating an emergency. The "special facts" here, *id.* at 151—an unconscious drunk driver—take this scenario beyond *McNeely* and show exigency. While *McNeely* observed that every case must be evaluated on the "totality of the circumstances," *id.* at

156, that principle is perfectly compatible with establishing a "general rule for the police to follow" based on commonly "recurring factual situations," *id.* at 168 (Roberts, J., concurring).

With an unconscious driver, a blood test is needed to obtain evidence because less invasive alternatives are unavailable. At the same time, a warrant requirement unreasonably risks delaying medical care. Law enforcement is not well-positioned to detect and assess the medical variables at play when confronted with an unconscious driver—such as whether unconsciousness resulted from other substances, injuries, or medical conditions. The Fourth Amendment does not require police to hazard a guess whether such a seriously impaired driver might be harmed by the extra time and attention needed to seek a warrant. These circumstances implicate both the imminent destruction of evidence and emergency aid exceptions, the latter of which acknowledges that "[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.'" *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

For these same reasons, when faced with an unconscious impaired driving suspect, it is not reasonable, practical, or workable to require law enforcement to seek a warrant for a blood test. This clear rule protects the interests of drivers and the public alike. In a scenario where law enforcement does not necessarily know all the relevant facts, this

rule avoids the choice between potentially delaying care for an unconscious person if a warrant is sought, and losing critical evidence if no warrant is sought or no blood test taken. It also provides State and local governments with the proof they need to punish and deter the most egregious impaired driving offenses. Petitioner offers no basis for invalidating these important State laws. Thus, under the Fourth Amendment's reasonableness touchstone, the lower court's decision should be affirmed. [3]

ARGUMENT

I. THE IMPLIED CONSENT LAWS PERMITTING BLOOD DRAWS FROM UNCONSCIOUS IMPAIRED DRIVING SUSPECTS ARE AN EXCEPTION TO THE FOURTH AMENDMENT'S WARRANT REQUIREMENT.

A. State legislatures enact implied consent laws as an important and permissible public policy response to the threat of impaired driving.

1. There is a high level of consensus among the States that implied consent laws are an important tool in the struggle against impaired driving. All fifty

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[3] *Amici* also agree with Respondent that the blood draw in these circumstances is a reasonable search incident to arrest. Under that exception, a warrant requirement is not reasonable for many of the reasons discussed herein.

States and the federal government require that, by operating a motor vehicle on the public roads, drivers implicitly consent to alcohol testing if they are arrested or detained under suspicion of impaired driving. *See Birchfield v. N. Dakota*, 136 S. Ct. 2160, 2169 (2016); 18 U.S.C. § 3118. The vast majority of States require that drivers on the public roads impliedly consent to *blood* testing, in particular. *See, e.g.*, OHIO REV. CODE ANN. § 4511.191(A)(2); R.I. GEN. LAWS § 31-27-2.1(a); S.D. COD. LAWS § 32-23-10.

Most States specify that unconscious drivers do not "withdraw" their consent for blood alcohol testing. *E.g.*, N.M. STAT. ANN. § 66-8-108 ("Any person who is dead, unconscious or otherwise in a condition rendering him incapable of refusal, shall be deemed not to have withdrawn the consent. . . ."). Indeed, at least thirty-one States have adopted laws that expressly allow warrantless blood draws from unconscious impaired drivers.[4] And otherwise-silent

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[4] ALA. CODE § 32-5-192(b); ALASKA STAT. § 28.35.035(b); ARIZ. REV. STAT. ANN. § 28-1321(C); ARK. CODE ANN. § 5-65-202(b); CAL. VEH. CODE § 23612(a)(5); COLO. REV. STAT. § 42-4-1301.1(8); 21 DEL. CODE ANN. § 2747; FLA. STAT. § 316.1932(1)(c); GA. CODE ANN. § 40-5-55(b); 625 ILL. COMP. STAT. 5/11-501.1(b); IOWA CODE § 321J.7; KY. REV. STAT. ANN. § 189A.103(2); LA REV. STAT. ANN. § 32:661(B); MD. CODE ANN., CTS & JUD. PROC. § 10-305(c); MINN. STAT. § 169A.51(6); MO. REV. STAT. § 577.033; MONT. CODE ANN. 61-8-402(3); NEB. REV. STAT. § 60-6, 200; NEV. REV. STAT. § 484C.160; N.H. REV. STAT. ANN. § 265-A:13; N.M. STAT. ANN. § 66-8-108; OHIO REV. CODE ANN. § 4511.191(A)(4); OKLA. STAT. TIT. 47 § 751(C); ORE. REV. STAT. § 813.140; S.C. CODE ANN. § 56-5-2950 (H); TEX. TRANSP. CODE ANN. § 724.014; UTAH CODE ANN.

implied consent statutes have typically been interpreted to allow warrantless blood draws when the driver is unconscious. *See, e.g.*, *Sims v. State*, 358 P.3d 810, 818 (Idaho Ct. App. 2015) ("[A]lleged unconsciousness does not effectively operate as a withdrawal of his consent."); *Goodman v. Commonwealth*, 558 S.E.2d 555, 560 (Va. Ct. App. 2002) ("incoherence or unconsciousness does not constitute a refusal").

State legislatures thereby present drivers with a common-sense bargain: By choosing to exercise the privilege of driving on public roads in a given State, the driver gives his statutory consent to testing. *See* Robert B. Voas et al., *Implied-Consent Laws: A Review of the Literature and Examination of Current Problems and Related Statutes*, 40 J. Safety Research 77, 78 (2009). That consent remains operative if law enforcement finds that driver unconscious and has probable cause to believe she is guilty of driving impaired.

2. More broadly, implied consent laws represent the considered public policy determination by State legislatures that blood testing of an unconscious impaired driver is critical to protecting the public. State and local governments rely on blood testing evidence to obtain proof they need for convictions of

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§ 41-6A-522; VT. STAT. ANN. TIT. 23 § 1202(a)(2); W. VA. CODE § 17C-5-7(a); WIS. STAT. § 343.305(3)(b); WYO. STAT. ANN. § 31-6-102(c).

unconscious impaired drivers, as the Colorado Supreme Court explained:

> When drivers are unconscious, law enforcement officers are deprived of the evidence they typically rely on in drunk-driving prosecutions: unlike conscious drivers, unconscious drivers cannot perform roadside maneuvers, display speech or conduct indicative of alcohol impairment, or admit to alcohol consumption. In order to effectively combat drunk driving, the state needs some means of gathering evidence to deter and prosecute drunk drivers who wind up unconscious.

People v. Hyde, 393 P.3d 962, 969 (Colo. 2017); *see State of Indiana v. Bisard*, 973 N.E.2d 1229, 1236 (Ind. Ct. App. 2012) ("The implied consent statutes must be read with their global purpose in mind, namely to facilitate collecting evidence of impaired driving.").

Blood testing of unconscious drivers is necessary to remove the most severely impaired drivers from the roads. Warrantless blood tests protect State and local interests by preserving evidence that otherwise would be lost to the natural dissipation of substances in the blood. *Schmerber v. California*, 384 U.S. 757, 770 (1966). This is particularly so when breath tests are unavailable due to the impaired driver's own incapacity. J.A. 110; *cf. Birchfield*, 136 S. Ct. at 2184 (relying on "availability of the less invasive

alternative of a breath test" when requiring warrant for blood test). Testing without delay is crucial not only for obtaining impaired driving convictions but also for proving different types of crimes and degrees of punishment. *See* Pet'r Br. 49-50; *Missouri v. McNeely*, 569 U.S. 141, 167 (2013) (Roberts, J. concurring).

Indeed, severely impaired drivers, including those who drink to the point of unconsciousness, are especially dangerous to themselves and others on the roads: national data shows that over two-thirds of alcohol-impaired driving fatalities involve an impaired driver with a blood alcohol concentration (BAC) of 0.15 or more (about double the usual legal limit).[5] This is also the BAC level around which blackouts may occur.[6] Recognizing the greater dangers of high BAC, many states have enacted laws with enhanced sanctions for drunken driving offenders with a particularly high BAC.[7]

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[5] National Highway Traffic Safety Administration, U.S. Department of Transportation, *Traffic Safety Facts* (Dec. 2016), https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812350

[6] Aaron M. White, Ph.D., *What Happened? Alcohol, Memory Blackouts, and the Brain, Alcohol Research & Health*, 186-96, (2003:27(2)), https://pubs.niaaa.nih.gov/publications/arh27-2/186-196.htm.

[7] National Conference of State Legislatures, *Increased Penalties for High Blood Alcohol Content* (Nov. 14, 2016), http://www.ncsl.org/research/transportation/increased-penalties-for-high-blood-alcohol-content.aspx.

It is not only alcohol that leads to unconscious drivers: the Governors Highway Safety Association (GHSA) found that in 2016, 44% of fatally-injured drivers with known results tested positive for drugs, up from 28% just 10 years prior.[8] Many implied consent laws include similar provisions for drugs, including that consent is not withdrawn by the unconscious drugged driving suspect. Blood draws are often required for drug testing, which typically cannot be accomplished through ordinary breath tests. *E.g.*, COLO. REV. STAT. §§ 42-4-1301.1(2)(b)(I), (8). State and local governments have a paramount interest in enforcing laws against drugged driving, and blood testing is essential to detecting and prosecuting drug-impaired driving.[9] Instances of drivers found unconscious due to opioid overdoses, for example, have become all too familiar. Kristine Phillips, *Another parent's overdose, another child in the back seat: A 'new norm' for drug users?*, WASH. POST, Oct. 28, 2016.[10]

In addition, by recognizing that consent persists when a driver becomes unconscious, State legislatures send the consistent and impactful message that

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[8] Governors Highway Safety Association, *Drug-Impaired Driving: Marijuana and Opioids Raise Critical Issues for States*, 7 (2018), https://www.ghsa.org/sites/default/files/2018-05/GHSA_DrugImpairedDriving_FINAL.pdf ("GHSA Report").

[9] *Id.*, GHSA Report at 25-26, 30-35.

[10] *Available at*, https://www.washingtonpost.com/news/to-your-health/wp/2016/10/27/another-parents-overdose-another-child-in-the-back-seat-a-new-norm-for-drug-users/?utm_term=.c8ff7311322b.

impaired driving is likely to be detected and punished. Such a rule avoids placing unconscious impaired drivers at a perverse advantage over their conscious peers. While conscious drivers may withdraw their consent, they typically face civil penalties for doing so. *See Birchfield*, 136 S. Ct. 2160, 2185. As the Kansas Supreme Court reasoned, allowing an unconscious driver to avoid the implied consent laws "would permit the worst offender, the passed-out drunk, to escape provision of the statute by his own voluntary act." *State v. Garner*, 608 P.2d 1321, 1325 (Kan. 1980).

Clear rules around impaired driving promote State and local interest in deterrence, because "[i]f drivers believe . . . that impaired drivers are likely to be arrested, convicted and punished, many will not drive while impaired by alcohol."[11] Allowing an exception for the most impaired drivers would make that deterrent less clear and less effective. Implied consent laws and associated penalties "serve[] to aid the state in achieving the legitimate goals of removing drunk drivers from the road and imposing proper

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[11] National Highway Traffic Safety Administration, U.S. Department of Transportation, *Countermeasures That Work: A Highway Safety Countermeasures Guide for State Highway Safety Offices*, 1.10, 8th Ed. (2015), https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812202-countermeasuresthatwork8th.pdf; *see also Birchfield*, 136 S. Ct. at 2179 ("Governments "have a compelling interest in creating effective 'deterrent[s] to drunken driving' so such individuals make responsible decisions and do not become a threat to others in the first place.").

penalties on offenders." *Escarcega v. State ex rel. Wyo. DOT*, 153 P.3d 264, 270 (Wyo. 2007).

B. Implied consent is a well-established exception to the Fourth Amendment's warrant requirement.

1. These implied consent laws are permissible under the Fourth Amendment's consent exception. "It is well established that a search is reasonable when the subject consents." *Birchfield*, 136 S. Ct. at 2185. While sometimes a person consents expressly by word, the Court has also repeatedly recognized the possibility of implicit consent. *See, e.g., Florida v. Jimeno*, 500 U.S. 248 (1991) (consent to car search reasonably understood to imply consent to search a paper bag in front seat); *Frazier v. Cupp*, 394 U.S. 731, 740 (1969) (by sharing bag, petitioner "assumed the risk" the other party would allow a search); *South Dakota v. Neville*, 459 U.S. 553, 559 (1983) (describing South Dakota's "implied consent" law for blood testing of a possibly intoxicated driver); *Stoner v. California*, 376 U.S. 483, 489 (1964) (Fourth Amendment right can be "waive[d] by word or deed").

In accordance with these established principles, consent of a driver on the public roads may be inferred from their conduct and context. As explained above, the law in most States establishes that a person who chooses to drive on the public roads implicitly consents to blood tests for alcohol and other

intoxicating substances—and that consent endures if the driver is unconscious.

These valid state laws provide a robust basis for inferring consent, because they clearly establish the terms on which a person undertakes to drive on the public roads. Laws and regulations regularly require consent to various searches as preconditions for undertaking certain activities or enjoying certain privileges. *See, e.g,. Zap v. United States*, 328 U.S. 624, 626, 630 (1946) (FBI search authorized because contract with the Navy required contractor to open its records for inspection).

State laws mandate consent to a broad range of conditions as a prerequisite to driving on public roads. Among others, a driver is required to carry a copy of her license and produce that physical copy upon a police officer's demand; and a driver is required to produce proof, on demand, of the driver's liability insurance. *E.g.* MICH. C.L. § 257.311; MINN. STAT. § 169.791. Before a car is allowed on the road, the owner must have it inspected to verify it satisfies all the safety requirements, and in some states must submit to an emissions inspection, in which a state inspection facility will operate the car on a dynamometer and also recover electronic data. *E.g.* Wisc. Stat. §§ 110.20, 341.10; *cf. United States v. Jones*, 132 S. Ct. 945, 952 (2012) (attaching a device to a car "encroache[s] on a protected area" and thus constitutes a search). Petitioner rightly does not question the validity of these searches—even though

drivers consent to them only implicitly, and only by virtue of the state laws mandating that they do so.

On the contrary, this principle of implied consent has been commonplace for decades, and state laws providing for implied consent are part of the fabric of custom and social expectations connected to driving. *See Georgia v. Randolph*, 547 U.S. 103, 111 (2006) (observing that shared privacy expectations are "naturally enough influenced by" background law). New York enacted an implied-consent law by 1953, and by 1962, the concept of implied consent had become ordinary enough to be included in the Uniform Vehicle Code. 136 S. Ct. at 2169.

In 1957 the Court described blood testing as "routine in our everyday life," and concluded that a blood test on an unconscious motorist was among States' "reasonable means to make automobile driving less dangerous." *Breithaupt v. Abram*, 352 U.S. 432, 436, 439 (1957).[12] *Breithaupt* observed further that "[i]t might be a fair assumption that a driver on the highways, in obedience to a policy of the State, would consent to have a blood test made as a part of a sensible and civilized system protecting himself as

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[12] To be sure, the Court has also concluded that drawing blood for a test is a search, *Missouri v. McNeely*, 569 U.S. 141, 161, 165 (2013), but *Breithaupt* said nothing to the contrary. At a minimum, *Breithaupt* establishes that by the late 1950s, the notion that driving a car exposes the driver to blood tests was commonplace.

well as other citizens not only from the hazards of the road due to drunken driving." *Id.* at 435 n.2.

This widespread use and acceptance of blood tests for drug and alcohol testing reinforces the inference that a driver consents to blood testing. "The constant element in assessing Fourth Amendment reasonableness in the consent cases . . . is the great significance given to widely shared social expectations." *Randolph*, 547 U.S. at 111. For example, *Jimeno* held that a "general consent to a search of [a] car" includes permission to "consent to search containers within that car." 500 U.S. at 251. That conclusion held, not because the defendant had explicitly authorized a search of containers—he had said nothing on that point—but because the Court assessed how a "reasonable" person would understand a generalized consent to search a car. *Id.* As another example, a defendant might face evidence from a search of her dwelling, conducted in the defendant's absence with express permission solely from another person living there. As the Court has explained, "shared tenancy is understood to include an 'assumption of risk,'" under which the inhabitants of shared quarters "understand"—surely implicitly—"that any one of them may admit visitors." *Randolph*, 547 U.S. at 111.

As these cases establish, express permission is not necessary when it is reasonable to infer consent. Consistent with these principles, implied consent laws reasonably establish that an impaired driver's

consent to a blood test, inferred from her decision to drive, remains operative if she becomes unconscious.

2. Of course, a state law establishing implied consent to a search must be reasonable. Accordingly, the Court need not fear the specter that petitioner raises, that there is "no evident limiting principle" and States could legislate consent to any and every sort of search. Pet'r Br. 31; *id.* 32 (worrying a legislature might decree that use of phone lines constitutes consent "to search the contents of all communications thus conducted"). The Court has already described the relevant limits: a condition on driving must "have a nexus to the privilege of driving and entail penalties that are proportiona[te]." 136 S. Ct. 2160, 2186 (2016) (internal quotation marks omitted). The state laws requiring that a driver consent to blood tests are manifestly reasonable in that sense. Petitioner makes no argument to the contrary. Petitioner instead argues that blood draws are *per se* unreasonable because they are inherently too intrusive, Pet'r Br. 38, but *Breithaupt* disposed of that complaint decades ago, 352 U.S. at 437-39 ("The blood test procedure has become routine in our everyday life.").

In addition, as *Schneckloth v. Bustamante* explained, consent must be "the product of an essentially free and unconstrained choice." 412 U.S. 218, 225 (1973). Petitioner's choice was free and unconstrained: He chose to enter his van and drive it to Lake Michigan. *See* Pet'r Br. 3-4. Given the state law specifying that a person consents to a blood test by driving a vehicle, petitioner's actions constituted

his consent to that search. *Cf. Stoner*, 376 U.S. at 489 (consent can be "by word or deed").

Petitioner does not suggest he suffered any coercion or duress in his choice to drive. Instead, he attempts to evade state law by arguing Wisconsin cannot show consent unless "'all the surrounding circumstances' justif[y] that conclusion." Pet'r Br. 25 (quoting *Schneckloth*, 412 U.S. at 226). Since it would be nearly impossible to show petitioner knew about Wisconsin's implied-consent law, it supposedly follows that the State cannot rely on it as a source of consent. *Id.* But this theory depends on a serious misreading of *Schneckloth*. Prior to the Court's decision, lower courts had developed a number of fixed rules about consent, such as a notion that consent to a search must be "knowing and intelligent," and that consent is invalid unless a person knew she had a right to refuse a search. 412 U.S. at 233-36. The "all the surrounding circumstances" phrase simply corrected these misconceptions by establishing there is no across-the-board legal prerequisite to a "free and unconstrained choice." *See id.* 232-33 (rejecting proposition "that proof of knowledge of the right to refuse consent is a necessary prerequisite to demonstrating a 'voluntary' consent").

Yet petitioner takes *Schneckloth* to have erected its own prerequisites: he says Wisconsin must "show, at a minimum, that individuals . . . are aware of the implied-consent statute and . . . that they understand that driving signifies consent." Pet'r Br. 25. *Contra Schneckloth*, 412 U.S. at 246 ("[N]othing . . . justifies,

much less compels, the easy equation of a knowing waiver with a consent search."). Arguments like this turn *Schneckloth* on its head. In truth, nothing in *Schneckloth* precludes recognizing that when a driver has become unconscious before the blood draw, the consent she provided by driving still persists. When a State has mandated consent as a prerequisite to driving, the most important circumstances under *Schneckloth* are that the defendant made an unforced decision to drive, and then did not withdraw consent at the time of the blood draw.

3. Finally, and fundamentally, petitioner essentially denies that implicit consent to a search is even possible; petitioner insists that "the driver's consent *at the scene* must be voluntary." Pet'r Br. 20 (emphasis added). That sort of consent would not be implicit at all. For that reason, petitioner's claim is contrary to *Birchfield*, *McNeely*, and *Neville*, as well as to the host of cases in which this Court has recognized implicit consent through the acts of third parties.

The Court has long held that another resident of shared living quarters can consent to a search that covers the defendant's belongings. *See Randolph*, 547 U.S. at 110-112 (explaining that "shared tenancy is understood to include an 'assumption of risk'"). *Randolph* held that a defendant can reject a search if he is present at the time of the search and says no, *id.* at 112-13; but the Court reaffirmed that otherwise, a co-tenant's permission for a search is sufficient, *id.* at 121-22. On petitioner's theory, the defendant would

have to be present "at the scene"; but according to this Court's cases, the defendant implicitly consents by operation of "customary social usage," *see id.* at 121. In *Frazier*, an absent defendant "assumed the risk" of a search by "allowing Rawls to use the bag and in leaving it at his house." 394 U.S. at 740. That previous, implicit acceptance was adequate, without any need for the defendant to be present to provide contemporaneous voluntary consent.

The notion that a driver must freshly consent when the police want to draw blood would render meaningless the implied-consent laws that this Court has repeatedly endorsed. *Birchfield*, *McNeely*, and *Neville* all "refer[] approvingly to the general concept of implied-consent laws that impose civil penalties . . . on motorists who refuse to comply." 136 S. Ct. 2160, 2185 (citing 133 S. Ct. 1552; 103 S. Ct. 916). The very notion of civil penalties for refusing a test presupposes that a driver previously provided consent, by enjoying the privilege of driving *before* the incident. Otherwise a State would simply be punishing a person for asserting his Fourth Amendment rights.

C. Exigent circumstances justify a warrantless blood draw from an unconscious drunk driving suspect.

There are two other grounds for upholding the constitutionality of the implied consent laws at issue here. First, Amici agree with Respondent that the warrantless blood test of an unconscious drunk

driving suspect is a reasonable search incident to arrest. Resp. Br. 55-58. Second, for many of the reasons described above, the exigent circumstances exception applies when an impaired driving suspect is unconscious. In those special circumstances, "the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Kentucky v. King*, 563 U.S. 452, 460 (2011).

McNeely considered whether dissipation of alcohol in the blood is "a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in *all* drunk-driving cases." *McNeely*, 569 U.S. at 145 (second emphasis added). Declining to adopt the "the broad proposition" that all drunk-driving cases "present a *per se* exigency," the Court held that natural dissipation of alcohol in the bloodstream does not constitute an exigency *in every case*." *Id.* at 165 (emphasis added). The Court expressly limited its holding to that "sole argument presented to us," *id.*—an across-the-board rule allowing a warrantless blood draw of every suspected drunk driver.

At the same time, *McNeely* acknowledged that "the metabolization of alcohol in the bloodstream and the ensuing loss of evidence are among the factors that must be considered in deciding whether a warrant is required." *Id.* Notably, in *McNeely*, there were no "other factors that would suggest [the officer] faced an emergency." *Id.* at 163. However, the Court regularly

considers whether particular facts and circumstances make a warrant requirement unduly burdensome. *Schmerber*, 384 U.S. at 771; *McNeely*, 569 U.S. at 150-51. This case presents "special facts" such as were absent in *McNeely*—namely, an unconscious drunk driving suspect. *Id.* at 150-151.

Where the impaired driver is unconscious, exigency is established by the confluence of two settled exceptions: the imminent destruction of evidence, and the need to provide emergency medical assistance. It is well-established that the "concern for preserving evidence or preventing its loss readily encompasses the inevitable metabolization of alcohol in the blood." *Birchfield*, 136 S. Ct. at 2182. In *Schmerber v. California*, the Court approved a warrantless blood test of a drunk driver because the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" 384 U.S. 757, 770. The Court has since recognized (in *McNeely*, no less) that in "some circumstances . . . the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test." *McNeely*, 569 U.S. at 153.

Also relevant here, the emergency aid exception permits a warrantless search because "[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.'" *Brigham City v.*

Stuart, 547 U.S. 398, 403 (2006) (quoting *Mincey v. Arizona*, 437 U.S. 385, 392 (1978)). A warrantless search is allowed "to assist persons who are seriously injured or threatened with such injury." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). "Officers do not need ironclad proof of 'a likely serious, life-threatening' injury to invoke the emergency aid exception." *Michigan v. Fisher*, 558 U.S. 45, 49 (2009) (per curiam). On the contrary, the medical assistance exception has been satisfied when officers saw a bloody lip, *Brigham City*, 547 U.S. at 406, or were confronted with damaged property and blood drops at the scene, *Fisher*, 558 U.S. at 46.

As discussed further below, the concerns animating these two exceptions come together to obviate the need for a warrant in the case of the unconscious impaired driver. When law enforcement has probable cause to believe that an unconscious driver is impaired, the compelling and urgent need of law enforcement to both gather evidence and care for the unconscious driver justify an exception to the warrant requirement. *See Fisher*, 558 U.S. at 49 (standard is whether there was "an objectively reasonable basis for believing" that there was an emergency). On the one hand, blood evidence of impaired driving should not be sacrificed because the unconscious driver needs medical care; on the other hand, medical care for the unconscious driver should not be delayed by the process of seeking a warrant.

To be sure, *McNeely* teaches that every case must be evaluated on the "totality of the circumstances."

But a general rule allowing warrantless blood tests of unconscious impaired driving suspects does not violate *McNeely*'s teaching that every case must be evaluated on its facts. 569 U.S. at 153. It simply recognizes that recurring facts in this pattern of cases satisfy the exigency exception. *See id.* at 175 (Roberts, J., concurring) ("pertinent facts in drunk driving cases are often the same, and the police should know how to act in recurring factual situations"). As demonstrated by exigency exceptions for emergency aid, fire, and hot pursuit, the Court's focus on the "totality of the circumstances" has left room for general rules based on generalizable facts. *E.g.*, *Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (burning building); *United States v. Santana*, 427 U.S. 38 (1976) (pursuit of armed robber into home).

In the case of the unconscious driver, a blood test is necessary to avoid the destruction of evidence. At the same time, a warrant requirement unreasonably risks delaying medical care for the impaired driver. "[T]he exigencies of the situation" so presented render the warrantless blood draw objectively reasonable under the Fourth Amendment. *King*, 563 U.S. at 460.

D. It is unreasonable to require law enforcement to seek a warrant for a blood draw when an impaired driver is unconscious.

Whether viewed through the prism of consent, arrest, or exigency, "[t]he touchstone of the Fourth

Amendment is reasonableness." *Jimeno*, 500 U.S. at 250. Law enforcement officers are required to apply for a warrant only if "practicable." *Terry v. Ohio*, 392 U.S. 1, 20 (1968) ("police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure"); *see McNeely*, 569 U.S. at 174 (Roberts, J., concurring) (police must "apply for a warrant if practicable"). Likewise, it is this Court's "general preference to provide clear guidance to law enforcement through categorical rules." *Riley v. California*, 573 U.S. 373, 398 (2014). Providing police with "workable rules" requires "in large part" balancing the competing interests "on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers." *Id.* (internal quotations omitted).

Requiring law enforcement to seek a warrant when presented with an unconscious impaired driver is not reasonable, practical, or workable. Imposing a warrant requirement in this scenario risks delaying medical care and forces law enforcement to make sophisticated medical judgments that they may not be well-positioned to make, all the while risking the destruction of crucial blood evidence. Officers should not have to choose between potentially exacerbating the health condition of an unconscious person if a warrant is sought, and potentially losing evidence if no warrant is sought. *See Wayne v. United States*, 318 F.2d 205, 213 (D.C. Cir. 1963) (Burger, J. concurring) (in "checking a report of a dead, dying, or unconscious woman," if the police had "paused for a warrant with

the risk that the 'unconscious woman' might die while papers were being drawn[,] they could surely merit censure") (emphasis added).

Officers do not necessarily know why the impaired driver is unconscious, how long the driver has been unconscious, what substances the driver has taken, or if other factors have led to unconsciousness. The driver who is unconscious (as opposed to conscious) is more likely to be severely impaired and/or suffering from other serious medical problems which law enforcement cannot even detect. *See, e.g., Estate of Williams v. Cline*, 902 F.3d 643, 647 (7th Cir. 2018) (arrestee fell unconscious and died in squad car possibly from a sickle cell crisis); *Denham v. City of New Carlisle*, 741 N.E.2d 587, 593 (Ohio Ct. App. 2000) ("stuperous" bar patron who had reportedly been "unconscious" was not taken to hospital and died because he actually had suffered blunt impact injuries not just intoxication); *see also Spencer v. Abbott*, 731 F. App'x 731, 744 (10th Cir. 2017) (prisoner withdrawing from methadone was improperly diagnosed with spasms and seizure, when he actually suffered a severe stroke). The opioid epidemic has only heightened the challenges for law enforcement officers faced with medical emergencies. Katie Zezima, *As opioid overdoses rise, police officers become counselors, doctors and social workers*, WASH. POST, Mar. 12, 2017. Minutes count, particularly in cases of drug overdose, as Respondent demonstrates in its brief. Resp. Br. 54-55.

Without an exception for unconscious impaired drivers, the law will require officers to balance transportation delays, the resources required to obtain a warrant, the need to obtain evidence, and their assessment of the unconscious driver's medical condition. Petitioner downplays the burden imposed by a warrant, emphasizing that technological advances have made it easier to get one. Pet'r Br. 39-40. But unless the warrant requirement is effectively eviscerated, obtaining a warrant requires at least some commitment of time, resources, and attention.

Law enforcement should not be expected to guess whether there is enough time to get a warrant without harming the unconscious driver while at the same time providing or arranging medical care. *See* ABA Standards for Criminal Justice § 1-2.2 ("[M]ost police agencies are currently given responsibility, by design or default, to: . . . (c) aid individuals who are in danger of physical harm; . . . (f) assist those who cannot care for themselves; . . . (g) resolve conflict; . . . and (k) provide other services on an emergency basis."); *see generally Deshaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989) ("When the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.").

In these circumstances, the more reasonable, clear, and workable rule is to recognize that police do not need a warrant to take a blood test when they have probable cause to believe an unconscious driver

is impaired. This clear guidance to law enforcement will protect the public by aiding prosecution of the most severely impaired drivers while also protecting drivers by facilitating prompt medical care.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the Wisconsin Supreme Court's judgment should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

GERALD P. MITCHELL,

Petitioner,

v.

WISCONSIN,

Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF *AMICUS CURIAE* RESTORE THE FOURTH, INC. IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Restore the Fourth, Inc. ("Restore the Fourth") is a national, non-partisan civil liberties organization dedicated to the robust enforcement of the Fourth Amendment to the U.S. Constitution. Restore the Fourth believes that everyone is entitled to privacy in their persons, homes, papers, and effects and that modern changes to technology, governance, and law should foster—not hinder—the protection of this right.

To advance these principles, Restore the Fourth oversees a network of local chapters, whose members include lawyers, academics, advocates, and ordinary citizens. Each chapter devises a variety of grassroots activities designed to bolster political recognition of Fourth Amendment rights. On the national level, Restore the Fourth also files *amicus curiae* briefs in significant Fourth Amendment cases.[2]

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[1] This *amicus curiae* brief is filed based on the blanket consent of all parties. No counsel for a party authored this brief in whole or in part; nor did any person or entity, other than Restore the Fourth, Inc. and its counsel, contribute money intended to fund the preparation or submission of this brief.

[2] *See, e.g.*, Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Collins v. Virginia*, No. 16-1027 (U.S. filed Nov. 17, 2017); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Byrd v. United States*, No. 16-1371 (U.S. filed Nov. 16, 2017); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Carpenter v. United States*, No. 16-402 (U.S. filed Aug. 14, 2017).

SUMMARY OF THE ARGUMENT

This case affords the Court an important chance to clarify when consent will validate a government search under the Fourth Amendment. At issue is "[w]hether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement." Cert. Pet. ii. The Wisconsin Supreme Court said 'yes' based on a rationale that, under these circumstances, amounts to a contradiction-in-terms: implied consent.

In the past, this Court has "referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply" with government-administered blood-alcohol tests. *Birchfeld v. North Dakota*, 136 S. Ct. 2160, 2185 (2016). This case now shows how far these laws can go, authorizing one of the most invasive searches imaginable (a blood draw) to be performed on persons who cannot give (or refuse) consent in any real sense of the term.

Left standing, this outcome risks "unleash[ing] a principle of constitutional law" with "no obvious stopping place." *Luis v. United States*, 136 S. Ct. 1083, 1094 (2016). The Court therefore should use this case to reexamine the concept of implied-consent laws, especially in light of the common law and founding era history. Only then is it possible to recognize that the Fourth Amendment in fact embraces just one kind of consent: actual voluntary consent.

ARGUMENT

I. Consent is a hallowed legal concept.

In considering the relationship between implied-consent laws and the Fourth Amendment, the Court should "start with first principles." *United States v. Lopez*, 514 U.S. 549, 552 (1995). Such analysis reveals that "consent" carries a precise meaning in the law—one that cannot be squared with either the theory or practice of implied-consent laws.

A. Consent is an affirmation of free will.

Consent is a matter of "our own judgment."[3] It is the "[a]greement of the mind to what is proposed or stated by another," making it "a yielding of the mind or will to that which is proposed." *State v. Glushko*, 266 P.3d 50, 55 (Or. 2011) (punctuation omitted) (quoting NOAH WEBSTER, 1 AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (reprint 1970)); *see also Schweitzer v. Comenity Bank*, 866 F.3d 1273, 1276 (11th Cir. 2017) ("At common law, consent is a willingness for certain conduct to occur.").

Consent, then, is about respect for the human mind and our capacity to choose—i.e., an affirmation of free will. On this basis, the idea of consent plays a seminal role in nearly every field of law. "An essential element of any contract is the consent of the parties, or mutual assent." *Donovan v. RRL Corp.*, 27 P.3d 702,

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[3] GEORGE CRABB, ENGLISH SYNONYMES 228 (London, Baldwin & Craddock, 6th ed. 1837).

815 (Cal. 2001). Property law is likewise founded on consent. *See, e.g.*, *Wilkinson v. Leland*, 27 U.S. 627, 658 (1829) (Story, J.) (noting that legislative attempts "to transfer the property of A. to B. without his consent" are "inconsistent with just principles").

Consent is also a cornerstone of tort law. A person "who effectively consents to [the] conduct of another [that is] intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it." RESTATEMENT (SECOND) OF TORTS § 892A(1) (Am. Law Inst. 1979). "This principle is expressed in the ancient legal maxim, *volenti non fit injuria*, meaning that no wrong is done to one who consents." *Id.* § 892A cmt. a.

With this in mind, when one considers all these appearances of "consent" in the law, three essential aspects of this idea emerge:

First, "the basic premise of consent is that it is 'given voluntarily.'" *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 270–71 (3d Cir. 2013); *see also, e.g.*, *State v. King*, 209 A.2d 110, 113 (N.J. 1965) ("Implicit in the very nature of the term 'consent' is the requirement of voluntariness."). Consent cannot be obtained from the unconscious—or through lies—or at gunpoint. "[C]onsent, in law, is more than a mere formal act of the mind. It is an act unclouded by fraud, duress, or sometimes even mistake." *Cary v. Hotailing*, 1 Hill 311, 314 (N.Y. Sup. Ct. 1841); *see also, e.g.*, *McClellan v. Allstate Ins. Co.*,

247 A.2d 58, 61 (D.C. 1968) ("consent obtained on the basis of deception is no consent at all").

Second, consent is limitable. "A person may limit her consent as she likes, consenting to one act but not another, or to acts at one time but not another, or to acts under some conditions but not others." *Schweitzer*, 866 F.3d at 1276 (punctuation and alterations omitted) (quoting DAN DOBBS ET AL., 1 THE LAW OF TORTS § 108, at 328 (2d ed. 2011)). As such, if "A gives B permission to dump 'a few stones' upon A's land" and "B covers the land with large boulders," consent will not excuse B's conduct. RESTATEMENT (SECOND) OF TORTS § 892A cmt. c, illus. 1; *see id.* § 892A(4) ("If the actor exceeds the consent, it is not effective for the excess.").

Third, "consent is revocable." *Gager*, 727 F.3d at 270 (this is a "basic common law principle"). On this score, "consent is terminated when the actor knows or has reason to know that the other is no longer willing for him to continue the particular conduct." *Id.* § 892A, cmt. i. And once consent to an actor's conduct has been revoked, "the actor is [generally] no longer privileged to continue his conduct." *Id.* Consider the homeowner who asks a guest to leave. This revocation of consent leaves "no right or license" for the guest to remain, no matter how much the guest wants to stay. *Mitchell v. Mitchell*, 55 N.W. 1134, 1135 (Minn. 1893).

Taken together, the preceding aspects of consent demonstrate that consent "isn't some inkblot" onto which legislatures "may project their hopes and dreams." *Cordova v. City of Albuquerque*, 816 F.3d 645,

661 (10th Cir. 2016) (Gorsuch, J., concurring in the judgment). Consent rather stands for the fixed, enduring proposition that the exercise of free will stands apart from "resort . . . to legal measures" or "force and violence." *Mitchell*, 55 N.W. at 304. Put another way, consent is the opposite of compulsion—by law or by force. The Framers knew this all too well.

B. The Framers recognized that consent is fundamentally different from what is "prescribed by law."

For the Framers of the Constitution, the idea of consent was no small matter. In the Declaration of Independence, the Framers condemned Britain "for imposing Taxes on us without our Consent." James Otis was even more blunt: "For what one civil right is worth a rush, after a man's property is subject to be taken from him at pleasure, without his consent?"[4] This led Otis to emphasize that "[i]f a man is not his *own assessor* in person, or by deputy, his liberty is gone, or lays [e]ntirely at the mercy of others."[5]

The Framers thus drew a firm line between consent and legal prescriptions. Consent was something persons had to actually give, as opposed to being something that the government could decree or infer by statute. The best illustration of this may be seen in the Third Amendment to the Constitution: "No Soldier

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[4] JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED & PROVED 38 (Boston, Edes & Gill 1764).

[5] *Id.* (emphasis in original).

shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." *See Engblom v. Carey*, 677 F.2d 957, 966–68 (2d Cir. 1982) (Kaufman, J., concurring-in-part and dissenting-in-part) (providing a detailed history of the Third Amendment).

Under a plain reading, the Third Amendment allows government quartering of troops in homes during wartime with *either* "the consent of the Owner" *or* "in a manner to be prescribed by law." And in peacetime, only owner consent will suffice—there is no prescribed-by-law alternative. It cannot then be the case that all the Third Amendment requires in wartime or in peacetime is passage of a law declaring that all persons consent to the quartering of troops. For the Third Amendment to make sense, "consent" has to mean the opposite of what is "prescribed by law."

The history of the Third Amendment confirms this reading. The Third Amendment was enacted to redress the Quartering Acts of 1765 and 1774, which allowed the peacetime quartering of British troops "wherever necessary, including the homes of the colonists." *Engblom*, 677 F.2d at 967 (Kaufman, J., concurring-in-part and dissenting-in-part). Public revulsion to these Acts led many of the colonies to adopt constitutions that distinguished consent-based quartering of soldiers from legislative-based quartering of soldiers. *See id.* For example, "the Delaware Declaration of Rights, drafted in 1776, provided 'that no soldier ought to be

quartered in any house in time of peace without the consent of the owner, and in time of war in such a manner only as the Legislature shall direct.'" *Id.*

The idea that consent must be actually given by a person is not limited to the Third Amendment. Rather, the "prohibition against the unconsented peacetime quartering of soldiers protects an[] aspect of privacy from governmental intrusion." *Katz v. United States*, 389 U.S. 347, 350 n.5 (1967). That is also the mission of the Fourth Amendment, which guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." It is no surprise then that the same idea of consent behind the Third Amendment may be found in the Fourth Amendment, as defined by this Court.

C. For consent to validate a government search, such consent must have been given freely and voluntarily.

As noted above, the Fourth Amendment forbids "unreasonable searches," whether performed ad hoc by the police or authorized by statute. *See City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2449–52 (2014). A "search" for Fourth Amendment purposes is any government conduct that either trespasses on a constitutionally-protected area (i.e., "persons, houses, papers, and effects") or intrudes on a person's reasonable expectation

of privacy. *See United States v. Jones*, 565 U.S. 400, 404–07 (2012).

In cases where the government has conducted a "search," there are only three ways in which the government can validate the search (i.e., show the search is reasonable). One way is by showing that the search was conducted based on a warrant that satisfies the Fourth Amendment's Warrant Clause.[6] Another way is by showing that the search falls under one of the few "historically recognized exception[s] to the Fourth Amendment's general principle that a warrant be obtained." *United States v. Ramsey*, 431 U.S. 606, 621 (1977). Such exceptions include exigent circumstances and searches incident to arrest. *See id.*

The final way is by showing consent. "A search to which an individual consents meets [the] Fourth Amendment . . . ." *Katz*, 389 U.S. at 358 n.22. This makes sense. If consent can validate the quartering of troops in a person's home—a considerable invasion of privacy—consent should also be able to validate the government's search of that home (and any other constitutionally-protected area). *Cf. Engblom*, 677 F.2d at 962 (majority op.) ("The Third Amendment was designed to assure a fundamental right to privacy."). The question then becomes: under what circumstances is it permissible to conclude that consent validates a search?

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[6] *See* U.S. CONST., amend. IV ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

In *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968), the Court answered this question: "[w]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given." Then, in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the Court elaborated on the meaning of "freely and voluntarily," explaining that: "whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Id.* at 227–28.

Schneckloth establishes that consent under the Fourth Amendment is cut from the same cloth as consent under the common law. Consent will not validate a search unless the consent was voluntarily given. Moreover, "[a] suspect may . . . delimit . . . the scope of the search to which he consents." *Florida v. Jimeno*, 500 U.S. 248, 252 (1991); *see also Georgia v. Randolph*, 547 U.S. 103, 123 (2006) ("[A] physically present inhabitant's express refusal of consent to a police search is dispositive as to him . . . .").

Given this reality, consent is not an *exception* to the Fourth Amendment as much as it is a *waiver* of rights that must be gauged based on a fact-intensive review of a person's actions.[7] *See United States v.*

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[7] Among the facts to be considered in analyzing consent to a search are: "the characteristics of the accused (such as age, maturity, education, intelligence, and experience) as well as the conditions under which the consent to search was given (such as the officer's conduct); the number of officers present; and the

Carter, 378 F.3d 584, 587 (6th Cir. 2004) ("[I]t is well-settled that a person may waive his Fourth Amendment rights by consenting to a search."). Consent thus stands apart in Fourth Amendment law, such that "a 'search' . . . generally qualifies as 'unreasonable' when [it is] undertaken without a warrant, consent, or an emergency." *United States v. Carloss*, 818 F.3d 988, 1004–05 (10th Cir. 2016) (Gorsuch, J., dissenting). Implied-consent laws scramble this equation.

II. Implied-consent laws have no place in Fourth Amendment jurisprudence.

The common law, founding era history, and this Court's jurisprudence all confirm that consent to a government search means a person giving actual, voluntary agreement to the search. At the same time, the Court's "prior opinions have referred approvingly to the general concept of implied-consent laws." *Birchfeld v. North Dakota*, 136 S. Ct. 2160, 2187 (2016). Close examination of this concept, however, reveals good reason for the Court to reconsider its approval. Simply put, implied-consent laws are the opposite of consent in every possible respect.

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duration, location, and time of the encounter." *United States v. Lattimore*, 87 F.3d 647, 650 (4th Cir. 1996).

A. Implied-consent laws deem consent to exist to government searches.

In form and function, implied-consent laws are a wolf in sheep's clothing. Under the guise of consent, these laws allow searches against a person's will and even while they are unconscious. To appreciate this reality, however, one must first be careful to separate implied-consent laws from the general principle that actual consent to a government search may be delivered in "express or implied" terms. *United States v. Iverson*, 897 F.3d 450, 458 (2d Cir. 2018); *see also Birchfield*, 136 S. Ct. at 2185 ("It is well established that . . . sometimes consent to a search need not be express but may be fairly inferred from context.").

Actual consent to a government search may be given "in the form of words, gesture, or conduct." *United States v. Griffin*, 530 F.2d 739, 742 (7th Cir. 1976). Hence, if the police knock on a person's door, ask permission to enter, and the person "le[aves] the door open and wave[s] them in," actual consent to a search exists despite the person's silence. *Kaminsky v. Schriro*, No. 18-403, 2019 U.S. App. LEXIS 2288, at *5–6 (2d Cir. Jan. 24, 2019). "[C]onsent may be implied by silence where a reasonable person would speak if objecting." *Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 904 F. Supp. 818, 821 n.2 (N.D. Ill. 1995).

Implying actual consent from a specific person's reaction to a specific search is a far cry, however, from establishing as a matter of law that an entire class of persons may be deemed to consent to a search no

matter their individual reactions to the search. That is what implied-consent laws do. Consider Georgia's implied-consent law for blood-alcohol searches. Under this law, motorists are "deemed to have given consent" to "blood, breath, [and] urine" tests to enable the police to "determin[e] the presence of alcohol or any other drug." GA. CODE ANN. § 40-5-55(a) (2018). The law also establishes that consent to testing will be deemed to exist even if a motorist is "dead, unconscious, or otherwise . . . incapable of refusal." *Id.* § 40-5-55(b).[8]

It is no exaggeration, then, to say that implied-consent laws stand in direct conflict with "the basic premise of consent." *Gager*, 727 F.3d at 270–71. Consent under these laws is not something that a person voluntarily gives—rather, it is something that the law imposes on persons in a manner they can neither limit nor revoke, not even through unconsciousness or death. These laws seek to take advantage of the idea of consent while failing to do the hard work that this idea calls for: attempt to convince someone to agree to a search without resort to authority or duress.

This is a common problem when it comes to government searches. Consider *United States v. Carloss*, in which the government sought to justify a search on the ground that "it enjoy[ed] a license or invitation flowing from the homeowner." 818 F.3d at 1005 (Gorsuch,

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[8] Georgia is not alone in this regard. *See, e.g.*, ARIZ. REV. STAT. § 28-1321(C) (2018); ARK. CODE ANN. § 5-65-202(b) (2018); COLO. REV. STAT. § 42-4-1301.1(8) (2018); OHIO REV. CODE ANN. § 4511.191(A)(4) (2018).

J., dissenting). To this end, in the name of consent, the government asked the court to enshrine the opposite: that "its agents enjoy[ed] a special and irrevocable right to invade a home's curtilage for a knock and talk . . . whatever the homeowner may say or do about it." *Id.* Implied-consent laws are but a variation on this theme—and one that is wholly lacking in justification.

B. None of the grounds on which implied-consent laws deem consent to exist withstand close scrutiny.

In considering implied-consent laws, courts have offered two main justifications for why consent to certain government searches can be "implied" by law. The first is voluntary participation in some otherwise lawful activity related to the search—e.g., "motorists may be deemed to have consented by virtue of [their] decision to drive on public roads." *Birchfeld*, 136 U.S. at 2185. The second is the presence of a putative choice between submitting to a search or accepting "penalties and evidentiary consequences" for refusing to comply. *Id.* Both explanations fall short.

The problem with implying consent to a search based on a person's voluntary participation in a lawful activity (e.g., driving) is that the government in general "may not impose conditions which require the relinquishment of constitutional rights." *Frost & Frost Trucking Co. v. R.R. Comm'n of Cal.*, 271 U.S. 583, 594 (1926). For good reason: "[i]f the state may compel the

surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all." *Id.* A state cannot then by law turn a person's voluntary participation in a lawful activity into a waiver of that person's Fourth Amendment rights, which is what consent to a search by definition means. *See Carter*, 378 F.3d at 587.

The Court has recognized as much in dealing with other equally important constitutional rights. In *Horne v. Department of Agriculture*, for example, the government argued to the Court that regulatory expropriation of raisins from certain raisin growers was not an unconstitutional taking "because raisin growers voluntarily choose to participate in the raisin market." 135 S. Ct. 2419, 2430 (2015). As the government put it: "[I]f [the] raisin growers don't like it, they can 'plant different crops'. . . ." *Id.*

This Court disagreed. "[P]roperty rights cannot be so easily manipulated." *Id.* (punctuation omitted). The same goes for Fourth Amendment rights. They cannot be eliminated on the premise, that if motorists don't like it, for example, they can take the bus. In the same vein, the Court has observed that only "the most fictional sense of voluntary consent to . . . searches [can] be found in the single fact that one conducts a business affecting interstate commerce." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 314 (1978)

The second conceptual explanation for implied-consent laws—that consent may be implied from the choice that these laws offer between submission and

punishment—fares no better. "[S]ubmission to law-enforcement . . . [is] not such consent as constitute[s] . . . [a] voluntary waiver . . . [of] the Fourth Amendment." *United States v. Elliott*, 210 F. Supp. 357, 360 (D. Mass. 1962). By extension, the "decision to step aside and permit" a search "rather than face a criminal prosecution" also does not equal "consent." *United States v. Biswell*, 406 U.S. 311, 315 (1972).

In the end, just as "[s]tatutes authorizing warrantless searches . . . do no work where the subject of a search has consented," the same is true when the subject of a search has *not* consented (i.e., not given actual consent). *City of Los Angeles*, 135 S. Ct. at 2451; *see also Biswell*, 406 U.S. at 315 ("[T]he legality of the search depends not on consent but on the authority of a valid statute."). Consent to government searches cannot be manufactured by law—and the Framers' bitter experience with statutes authorizing warrantless searches only confirms this point.

C. The Framers would have rejected the idea of implied-consent laws.

In construing the Fourth Amendment, history is critical. "One cannot wrench 'unreasonable searches' from the text and context and historic content of the Fourth Amendment." *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950) (Frankfurter, J., and Jackson, J., dissenting). It is therefore essential as part of any effort to "determin[e] whether a search or seizure is unreasonable" to consult "the statutes and common law of

the founding era to determine the norms that the Fourth Amendment was meant to preserve." *Virginia v. Moore*, 553 U.S. 164, 168 (2008).

The Fourth Amendment "grew in large measure out of the colonists' experience with . . . writs of assistance." *United States v. Chadwick*, 433 U.S. 1, 7–8 (1977). "A writ of assistance was a court order to individuals to assist customs officers in . . . their duties."[9] "[T]he writ did not authorize a search; it merely vouched for the identity of the customs officers who by their commissions were authorized to search."[10] At bottom, the writs gave "customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws." *Stanford v. Texas*, 379 U.S. 476, 481 (1965).

Sixty-three Boston merchants hired James Otis to challenge the writs in court. *See Commw. v. Haynes*, 116 A.3d 640, 649–50 (Pa. Super. Ct. 2015). Otis did so in a 1761 speech that inspired President John Adams to proclaim: "Then and there the child Independence was born." *Riley v. California*, 134 S. Ct. 2473, 2495 (2014). During his speech, Otis explained that a "person with this writ . . . may enter all houses, shops, etc., at will,"[11] making the writs "the worst instrument of arbitrary power."[12]

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[9] Tracy Maclin & Julia Mirabella, *Framing the Fourth*, 109 MICH. L. REV. 1049, 1053 n.18 (2011).

[10] *Id.* (internal punctuation and alterations omitted).

[11] 2 WORKS OF JOHN ADAMS 524 (C. Adams ed. 1850).

[12] *Id.* at 523.

Following Otis's attack on the writs, Parliament enacted the 1767 Townshend Act. The Act noted that it was "doubted whether . . . officers can legally enter houses and other places on land, to search for and seize goods."[13] "To obviate . . . [these] doubts for the future," the Act expressly authorized "such writs of assistance" as would enable British customs officials "to enter and go into any house, warehouse, shop, cellar, or other place" in America "to search for and seize prohibited or uncustomed goods."[14]

The Townshend Act did not pacify the Framers. "American judicial intransigence was sufficiently strong that local customs officials in several states did not even bother to apply for the writs." *State v. Ochoa*, 792 N.W.2d 260, 271 (Iowa 2010). It is then impossible to believe that the Framers would have found the writs reasonable if only the Townshend Act read like an implied-consent law, deeming consent to exist by virtue of the colonists' decision to trade in taxed goods. This leaves no doubt that the Framers would have rejected the idea of implied-consent laws.

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[13] The full text of the Townshend Act may be viewed as part of the Yale Law School's Avalon Project. *See* http://avalon.law.yale.edu/18th_century/townsend_act_1767.asp.

[14] *Id.*

III. The Court should clarify in *Mitchell* that actual consent is the only kind of consent that the Fourth Amendment respects.

Seventy years ago, Justice Jackson warned that "any privilege of search and seizure without warrant" sustained by this Court will be "push[ed] to the limit." *Brinegar v. United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting). Fourth Amendment cases thus require the Court to contemplate not only "what has been" but also "what may be." *Weems v. United States*, 217 U.S. 349, 373 (1910). Based on these principles, the Court should now clarify that the only kind of consent that will validate a search under the Fourth Amendment is actual voluntary consent.

In this case, the Wisconsin Supreme Court held that an implied-consent law established consent on the part of an unconscious driver to a blood draw consistent with the Fourth Amendment. *See* Cert. Pet. App. 22a. If a legislature can deem consent to exist under these circumstances, there is no stopping point. "[H]istory exemplifies the tendency of a principle to expand itself to the limit of its logic." *Krulewitch v. United States*, 336 U.S. 440, 445 (1949) (Jackson, J., concurring) (quotation marks omitted).

For example, consider the risk that implied-consent laws pose to the Court's landmark 2014 decision in *Riley v. California*, 134 S. Ct. 2473 (2014). The Court held in *Riley* that absent exigency, "what police must do before searching a cell phone" is "simple": "get a warrant." *Id.* at 2495. Yet, in 2016, Vermont

considered passing a law under which all motorists would be "deemed to give . . . consent to search a portable electronic device" to let the police find out if a motorist was texting-while-driving.[15]

The risks posed by implied-consent laws do not stop at the highway's edge. The government has also sought to extend their logic to searches of the home. *See, e.g., Elkins v. District of Columbia,* 710 F. Supp. 2d 53, 65 (D.D.C. 2010) (noting the government's argument that "obtaining a building permit for a private home constitutes 'implied consent' to search for a review of construction work"). This is despite the fact that "the home is first among equals" under the Fourth Amendment. *Florida v. Jardines*, 569 U.S. 1, 6 (2013). Indeed, the concept of implied consent now "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

Actual voluntary consent, on the other hand, reflects "the long view, from the original meaning of the Fourth Amendment forward." *Kyllo v. United States*, 533 U.S. 27, 34 (2001). The Court should not hesitate to restore that view. "The Fourth Amendment is, after all, supposed to protect the people at least as much now as it did when adopted, its ancient protections still in force whatever our current intuitions or preferences

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[15] Vt. H.B. 527 (2016), *available at* https://bit.ly/2IRXwU5; *see also* Jess Aloe, *Proposed Law Could Allow Warrantless Phone Searches*, BURLINGTON (VT.) FREE PRESS, Jan. 17, 2016, http://bfpne.ws/1UYvnpj.

might be." *Carloss*, 818 F.3d at 1011 (Gorsuch, J., dissenting).

CONCLUSION

The idea of consent is second-to-none in terms of its ability to validate a variety of conduct, including government searches. The text, history, and purpose of the Fourth Amendment, in turn, establish that the only kind of consent that the Fourth Amendment respects is actual voluntary consent. The Court should use this case to make that clear.

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No. 18-6210

IN THE

Supreme Court of the United States

GERALD P. MITCHELL,
Petitioner,

v.

STATE OF WISCONSIN,
Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF THE RUTHERFORD INSTITUTE AND THE CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The Rutherford Institute is an international nonprofit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the resolution of this case because it concerns the proper balance between the State's power to investigate criminal activity and an individual's right to be free of unreasonable invasions of his privacy—including, most importantly, his right to be free from unwarranted invasions of his bodily autonomy.

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[1] This amicus brief is filed with the parties' consent. Petitioner and Respondent filed their consents on February 18, 2019. No counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

and forums, and produces the annual Cato Supreme Court Review.

SUMMARY OF ARGUMENT

1. The Fourth Amendment is the constitutional bulwark that protects individuals from unreasonable searches by the government. As is implicit in its text, the ultimate touchstone of the amendment is reasonableness. And, subject only to a few well-delineated and narrowly circumscribed exceptions, the Court has repeatedly held that searches undertaken to discover evidence of criminal wrongdoing are per se unreasonable and thus violate the Fourth Amendment if conducted without a warrant. Accordingly, such warrantless searches ordinarily do not pass constitutional muster.

One recognized exception to this requirement permits warrantless administrative inspections of businesses operating within certain industries subject to pervasive governmental regulations. This Court's jurisprudence teaches, however, that the reach of the "pervasively regulated business" exception is exceedingly limited. It sanctions warrantless searches of only a limited subset of businesses whose owners have a diminished expectation of privacy—if any expectation at all—in the facilities from which they conduct their operations. The Court has further cabined this exception by limiting its application to administrative inspections aimed not at gathering evidence of suspected criminal activity, but rather at verifying compliance with the regulations to which such businesses are subject. The absence of any expectation of privacy or particularized suspicion of criminal wrongdoing are thus foundational elements of the exception.

2. In the decision below, the Wisconsin Supreme Court found no constitutional infirmity in a warrantless search of a person arrested for operating a vehicle while intoxicated, even though the search: (a) included the extraction of the person's blood; (b) was based on an individualized suspicion that the person had committed the criminal act for which he had already been arrested; and (c) was intended to obtain evidence of his guilt. Straining to find a constitutional footing for its decision not to enforce the general rule that a warrantless criminal search is per se unreasonable, a plurality of the Wisconsin Supreme Court sought to rely on the "pervasively regulated business" exception. This was error.

The warrantless search at issue here bears none of the hallmarks of an administrative inspection of a pervasively regulated business. The person searched undeniably had a significant, constitutionally protected expectation of privacy in the integrity of his body. Indeed, the Court has recognized that piercing a person's skin with a syringe to extract blood from his veins implicates the most deep-rooted expectations of privacy a person may hold. Moreover, the search was performed for the specific purpose of obtaining evidence to substantiate the police officer's suspicion that the arrested person had violated Wisconsin's criminal statute prohibiting the operation of a vehicle while intoxicated. This is a far cry from the non-personal, suspicionless administrative inspections that may be conducted without a warrant under the "pervasively regulated business" exception.

3. The plurality below also ignored this Court's repeated guidance that the mere existence of licensing requirements or a potpourri of general regulations is insufficient to invoke the "pervasively regulated busi-

ness" exception. Rather, the exception applies only to businesses within a handful of particular industries for which there are comprehensive regulatory schemes and long histories of extensive government oversight. The Court has repeatedly stymied attempts to broaden the exception beyond these narrow constraints, and this case is but the latest effort at expanding the exception beyond its intended boundaries. If not corrected, the logic on which the plurality's ruling is based would allow the exception to swallow the constitutional rule, as persons participating in any activity that is regulated at the state level or requires a state-issued license would become subject to warrantless searches. If the Fourth Amendment is to be a true guide to constitutionally compliant police action, the decision below must be overturned.

4. The Wisconsin Supreme Court plurality further misconstrued the species of "consent" this Court has sometimes mentioned in its "pervasively regulated business" jurisprudence. Articulating one aspect of the reasoning for the exception, this Court has spoken of business owners' consent to voluntarily embark on businesses in closely-regulated industries. In this way, such owners consent to subject their businesses to the comprehensive regulatory frameworks within which they are required to operate. The plurality below wrongly equated this "consent" to a regulatory framework with a driver's supposed "implied consent"—simply by virtue of having driven a vehicle—to have his person searched for evidence of criminal wrongdoing, up to and including the sort of deeply invasive search at issue here. There is no parallel between these two forms of consent. And the Court's recognition of the former as a reason to forgo the warrant requirement for administrative inspections of pervasively regulated businesses lends no support to the

Wisconsin Supreme Court plurality's finding that the latter somehow renders a warrantless criminal search reasonable.

The Fourth Amendment's demand for pre-search judicial approval is one of the Constitution's great safeguards against arbitrary governmental action. Exceptions to that rule should be reserved for instances which are truly exceptional. That is the approach the Court has consistently followed and it should do so again in this case by finding that the "pervasively regulated business" exception does not apply to the class of search at issue here.

ARGUMENT

I. THE "PERVASIVELY REGULATED BUSINESS" EXCEPTION TO THE WARRANT REQUIREMENT IS A NARROW EXCEPTION THAT THIS COURT HAS REPEATEDLY DECLINED TO EXTEND BEYOND ITS TRADITIONAL SPHERE.

A. Absent an Exception, a Search Is Constitutional Only if Authorized by a Warrant Issued by a Neutral Magistrate.

The Fourth Amendment "gives concrete expression to a right of the people which 'is basic to a free society.'" *Camara v. Mun. Court of City and Cty. of San Francisco*, 387 U.S. 523, 528 (1967) (quoting *Wolf v. People of the State of Colo.*, 338 U.S. 25, 27 (1949)). It guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

"As the text makes clear, 'the ultimate touchstone of the Fourth Amendment is "reasonableness."'" *Riley v. California*, 573 U.S. 373, 381–82 (2014) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). And "whether a particular search meets the reasonableness standard is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53 (1995) (quotation marks and citations omitted).

Furthermore, "the definition of 'reasonableness' turns, at least in part, on the more specific commands of the warrant clause." *United States v. U.S. Dist. Court for the E. Dist. of Mich., S. Div.*, 407 U.S. 297, 315 (1972). "Warrants provide the 'detached scrutiny of a neutral magistrate, and thus ensur[e] an objective determination whether an intrusion is justified.'" *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2187–88 (2016) (Sotomayor, J., concurring in part and dissenting in part) (quoting *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 622 (1989)). Warrants therefore "give life to [the Court's] instruction that the Fourth Amendment 'is designed to prevent, not simply to redress, unlawful police action.'" *Id.* at 2188 (quoting *Steagald v. United States*, 451 U.S. 204, 215 (1981)).

In most criminal cases, this Court has balanced individual and governmental interests "in favor of the procedures described in the Warrant Clause." *Skinner*, 489 U.S. at 619. Accordingly, "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant." *Vernonia*, 515 U.S. at 653; *see also Katz v. United States*, 389 U.S. 347, 357 (1967) (noting that "searches conducted outside the judicial process, without prior

approval by judge or magistrate, are per se unreasonable under the Fourth Amendment"); *United States v. Jeffers*, 342 U.S. 48, 51 (1951) ("Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes."); *cf. Marshall v. Barlow's Inc.*, 436 U.S. 307, 312 (1978) (observing that "[t]his Court has already held that warrantless searches are generally unreasonable"). Indeed, "[s]earches conducted without warrants have been held unlawful notwithstanding facts unquestionably showing probable cause . . . for the Constitution requires that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . ." *Katz*, 389 U.S. at 357 (quotation marks and internal citations omitted); *see Jeffers*, 342 U.S. at 51 ("[T]he Amendment does not place an unduly oppressive weight on law enforcement officers but merely interposes an orderly procedure under the aegis of judicial impartiality that is necessary to attain the beneficent purposes intended."); *Arkansas v. Sanders*, 442 U.S. 753, 758 (1979) ("The mere reasonableness of a search, assessed in the light of the surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment.").

The reasoning for the warrant requirement was perhaps best summarized by Justice Jackson more than seventy years ago:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the

> often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.

Johnson v. United States, 333 U.S. 10, 13–14 (1948).

Following Justice Jackson's logic, the Court has held that "a search of private houses is presumptively unreasonable if conducted without a warrant." *See v. City of Seattle*, 387 U.S. 541, 543 (1967). And, pertinent to the case at bar, because "'[s]earch warrants are ordinarily required for searches of dwellings,' . . . 'absent an emergency, no less could be required where intrusions into the human body are concerned,' even when the search was conducted following a lawful arrest." *Missouri v. McNeely*, 569 U.S. 141, 148 (2013) (quoting *Schmerber v. California*, 384 U.S. 757, 770 (1966)).

"In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement." *Riley*, 573 U.S. at 382. But "[b]ecause

securing a warrant before a search is the rule of reasonableness, the warrant requirement is 'subject only to a few specifically established and well-delineated exceptions.'" *Birchfield*, 136 S. Ct. at 2188 (Sotomayor, J., concurring in part and dissenting in part) (quoting *Katz*, 389 U.S. at 357). These exceptions "have been jealously and carefully drawn . . . ." *Jones v. United States*, 357 U.S. 493, 499 (1958). Importantly, because an exception "invariably impinges to some extent on the protective purpose of the Fourth Amendment . . . [,]" the Court has "limited the reach of each exception to that which is necessary to accommodate the needs of society." *Sanders*, 442 U.S. at 759–60; *see Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971) ("If it is to be a true guide to constitutional police action, rather than just a pious phrase, then the exceptions cannot be enthroned into the rule.") (quotation marks and citation omitted).

B. The "Pervasively Regulated Business" Exception Is One of the Handful of Narrow and Tightly Circumscribed Exceptions Authorized by This Court.

This Court has recognized an exception to the warrant requirement for certain searches of businesses in "pervasively regulated" industries. Under this exception, legislative schemes authorizing warrantless administrative inspections of commercial property do not necessarily violate the warrant requirement. *See New York v. Burger*, 482 U.S. 691, 702 (1987).

The exception was first recognized in 1970 in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970). Since then, the Court has identified only four industries that qualify as "pervasively regulated": (1) liquor sales, (2) firearms dealing, (3) running an automobile junkyard, and (4) mining. *See City of*

Los Angeles v. Patel, 135 S. Ct. 2443, 2454 (2015). "The element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." *Marshall*, 436 U.S. at 313. The "close supervision" must be such that a business owner effectively has no reasonable expectation of privacy in the business. *Id.*

A party relying on this exception to validate a search must point to a statute permitting government agents to conduct warrantless searches in the context of a heavily regulated industry, and must demonstrate, *inter alia*, that that statute provides an adequate substitute for a warrant. *Burger*, 482 U.S. at 702–03. To meet this requirement, the "statutory scheme" must put the business owner on notice that his property will be subject to "periodic inspections undertaken for specific purposes" and it must limit the inspectors' discretion to determine which facilities are to be searched and what violations are to be pursued. *Id.* at 703; *Donovan v. Dewey*, 452 U.S. 594, 600, 604 (1981). In short, the statute must provide a "comprehensive and predictable inspection scheme." *Donovan*, 452 U.S. at 600.

Permitted "inspections" under the exception have so far been limited to civil inspections of commercial properties necessary to enforce governing statutes and regulations. Initially, these inspections were of a business's inventory and records regarding its inventory. *See Colonnade*, 397 U.S. at 75–77; *United States v. Biswell*, 406 U.S. 311, 316 (1972). In *Colonnade*, the Court noted in dictum that due to the long history of English and American regulation of the liquor industry, including warrantless inspections of inventories and records to enforce tax laws, "Congress has broad

authority to fashion standards of reasonableness for searches and seizures" of businesses in this "closely regulated industry." 397 U.S. at 77.

Two years later in *Biswell*, the Court held that businesses engaged in firearms dealing were subject to warrantless inspections of their records, firearms, and ammunition for compliance with gun control laws. 406 U.S. at 316–317. The Court noted that while government regulation of firearms dealers was not as deeply rooted in history as regulation of liquor sales, the regulations were comprehensive and each federally licensed firearms dealer was "annually furnished with a revised compilation of ordinances that describe his obligations and define the inspector's authority." *Id.* at 316.

In 1981, the Court expanded the exception to include inspections designed to identify health and safety issues in mining operations. *Donovan*, 452 U.S. at 606. In doing so, the Court emphasized that the statute at issue, like the gun control regulations at issue in *Biswell*, "establishe[d] a predictable and guided federal regulatory presence" clearly defining the scope and frequency of inspections that would apply to all mines. *Id.* at 604.

The Court returned to the roots of the exception in 1987, holding in *Burger* that businesses running an automobile junkyard were subject to warrantless inspections of their inventory and records. 482 U.S. at 712. The Court remarked that these businesses were part of the "junk-related" industry that had long been subject to extensive government regulations including record keeping requirements and warrantless inspections of records and inventory. *Id.* at 705–07.

Importantly, however, the Court has repeatedly emphasized that the "pervasively regulated" industry

is the exception, not the rule. *See Patel*, 135 S. Ct. at 2455; *Marshall*, 436 U.S. at 313–14. And it has on multiple occasions declined to expand the reach of the exception to encompass warrantless searches in other contexts. *See Patel*, 135 S. Ct. at 2456–57; *Marshall*, 436 U.S. at 324–25.

In *Patel*, for example, the Court declined to apply the exception to the hotel industry, holding that doing so "would permit what has always been a narrow exception to swallow the rule." 135 S. Ct. at 2455. The Court acknowledged that while hotels are subject to a variety of regulations regarding maintaining licenses, collecting taxes, conspicuously posting their rates, and meeting sanitary standards and that there is even a long history of laws obligating hotels to provide "suitable lodging" to paying guests, this "hodgepodge of regulations" does not constitute a "comprehensive [regulatory] scheme." *Id.*

Likewise, in *Marshall*, the Court rejected a bid to extend the "pervasively regulated business" exception to all employment facilities subject to the Occupational Safety and Health Act ("OSHA"). 436 U.S. at 321–25. Emphasizing the limited reach of the exception, the Court held that general regulations like minimum wage and maximum hour regulations are not sufficient to invoke the exception. *Id.* at 313–15.

While this exception is well established, the Court's application of it has been reserved for a specific set of "unique circumstance[s]." *Marshall*, 436 U.S. at 313. The Wisconsin Supreme Court plurality, however, sought to apply the rationale underlying the exception to an entirely new category of searches far beyond anything this Court has envisioned in any past decision.

II. THE "PERVASIVELY REGULATED BUSINESS" EXCEPTION CANNOT SUPPORT A SUSPICION-BASED SEARCH INITIATED TO GATHER EVIDENCE OF CRIMINAL CONDUCT.

In the decision under review, a plurality of the Wisconsin Supreme Court relied on the "pervasively regulated business" exception by analogizing Wisconsin's licensing requirements and driving regulations to the regulatory frameworks controlling the liquor, mining, junkyard, and firearms industries. *State v. Mitchell*, 914 N.W.2d 151, 157–68 (Wisc. 2018). Ultimately, the plurality concluded that consent to search attributed to motorists under Wisconsin's implied-consent laws is "voluntary . . . similar to the voluntariness of consent" attributed to pervasively-regulated businesses. *Id.* at 157–59, 163.

The plurality's reliance on the "pervasively regulated business" exception was misplaced. In its haste to justify resorting to the exception, the court disregarded two core principles that animate the exception. First, the exception applies only in industries where, by virtue of the comprehensive nature of the statutory scheme, the proprietor lacks any reasonable expectation of privacy. Second, the search must be conducted pursuant to a scheme that provides for suspicionless, warrantless inspections; said otherwise, the search must be for a purpose other than to gather evidence of criminal wrongdoing. The Wisconsin Supreme Court plurality ignored each of these necessary preconditions for the exception's application. It therefore erred in relying on the exception for "pervasively regulated businesses" and its decision should be reversed.

A. The "Pervasively Regulated Business" Exception Is Based on the Business Owner's Lack of Any Reasonable Expectation of Privacy.

First, this Court has restricted the "pervasively regulated business" exception to searches of certain businesses that are so heavily regulated that the owner of such a business does not have an expectation of privacy in the business. The exception "is essentially defined by 'the pervasiveness and regularity of the federal regulation' and the effect of such regulation upon an owner's expectation of privacy." *Burger*, 482 U.S. at 701 (quoting *Donovan*, 452 U.S. at 606).

This Court has recognized that not all expectations of privacy are created equal; rather, some are greater than others. For instance, although both a homeowner and a business's proprietor have a reasonable expectation of privacy in their respective properties, the expectation of privacy in commercial premises "is different from, and indeed less than, a similar expectation in an individual's home." *Id.* at 700. And, critically for the present case, this Court has also explained that the expectation of privacy in commercial property in a "closely regulated" industry is even lower than the expectation of privacy in commercial property generally. *Id.* In fact, the Court has held that there is no expectation of privacy in such property: "[pervasively regulated] industries have such a history of government oversight that ***no reasonable expectation of privacy*** . . . could exist for a proprietor over the stock of such an enterprise." *Marshall*, 436 U.S. at 313 (emphasis added).

At the opposite end of the spectrum is an individual's expectation of privacy in his own person—the expectation to be free from physical intrusions into

one's body. Indeed, an invasion of bodily integrity "implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *McNeely*, 569 U.S. at 148 (quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985)). Accordingly, "the importance of requiring authorization by a 'neutral and detached magistrate' before allowing a law enforcement officer to 'invade another's body in search of evidence of guilt is indisputable and great.'" *Id.* (quoting *Schmerber*, 384 U.S. at 770).

The diminished expectation of privacy of a business owner in a "pervasively regulated" business is a core tenet of the exception permitting warrantless searches of such businesses: Because there is little or no expectation of privacy in such settings, it is possible that a particular search—if properly limited in scope and purpose—could be found reasonable notwithstanding the absence of a magistrate's imprimatur. *Burger*, 482 U.S. at 702. While this reduced expectation of privacy does not, in and of itself, permit a warrantless search of such a business, it is a necessary precondition—and one that is wholly lacking here.

The Wisconsin Supreme Court plurality therefore erred, because unlike the owner of a pervasively regulated business, the individual searched here had a "significant, constitutionally-protected privacy interest[ ]" in being free from compelled intrusions into his body. *McNeely*, 569 U.S. at 159. Put otherwise, even though the search at issue implicated the greatest and "most deeply-rooted" privacy interest a person may hold, the plurality dispensed with the Fourth Amendment warrant requirement by applying an exception that is founded on the absence of any expectation of privacy. This apples-to-elephants analysis cannot stand.

B. The "Pervasively Regulated Business" Exception Permits "Administrative Inspections," Not Criminal Searches.

The Wisconsin Supreme Court plurality also disregarded the material distinctions between the purpose and scope of searches permitted under the "pervasively regulated business" exception and the purposes and scope of the search at issue.

The "pervasively regulated business" exception is a subset of the "administrative search" doctrine. *See Patel*, 135 S. Ct. at 2454. That doctrine permits warrantless searches—often referred to as "administrative inspections"—where the "primary purpose" of the search is "'[d]istinguishable from the general interest in crime control.'" *Id.* at 2452 (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000)). The rationale underlying the administrative search doctrine is that such administrative searches "are neither personal in nature nor aimed at the discovery of evidence of crime" and therefore involve "a relatively limited invasion of . . . privacy." *Camara*, 387 U.S. at 537.

Administrative searches are not personal in nature because they are not based on suspicion of any violation. *See Edmond*, 531 U.S. at 37. While a search is ordinarily unreasonable "in the absence of individualized suspicion of wrongdoing[,]" this Court has recognized a few limited circumstances where the usual rule does not apply: (1) "certain regimes of suspicionless searches where the program was designed to serve special needs, beyond the normal need for law enforcement"; and (2) "searches for certain administrative purposes without particularized suspicion of misconduct, provided that those searches are appropriately limited." *Id.* Administrative searches, including those of "perva-

sively regulated" businesses fall under the latter heading. *Id.*

The "suspicionless" nature of an administrative search is essential to its constitutionality. Without any particularized suspicion of wrongdoing, the "reasonableness" of such a search rises or falls on the reasonableness of the "regulatory scheme" authorizing the search. *See, e.g.*, *Burger*, 482 U.S. at 702–03; *Camara*, 387 U.S. at 534–36. As one court has explained, "a regulatory inspection is not premised on an officer's on-the-spot perception that he has an individualized suspicion that the specific individual to be seized and searched is involved in criminal activity. . . . [It] is instead premised on the individual subject to the warrantless seizure and search ***knowingly and voluntarily engaging in a pervasively regulated business***, and ***on the existence of a statutory scheme*** that puts that individual on notice that he will be subject to warrantless administrative seizures and searches." *United States v. Herrera*, 444 F.3d 1238, 1246 (10th Cir. 2006) (emphasis added). The applicable regulations, or "statutory scheme," must make the business owner aware that his property will be subject to "periodic inspections undertaken for specific purposes," *Burger*, 482 U.S. at 703, and must limit the inspectors' discretion to determine which facilities are to be searched and what violations are to be pursued, *Donovan*, 452 U.S. at 604. In short, the inspections must be standardized and predictable.

Furthermore, the purpose of a suspicionless administrative inspection is not to investigate violations of criminal laws. *See Patel*, 135 S. Ct. at 2452; *Michigan v. Clifford*, 464 U.S. 287, 292, 294 (1984) (in fire investigation, the constitutionality of a post-fire inspection depends upon "whether the object of the search is

to determine the cause of the fire or to gather evidence of criminal activity"). Rather, they are aimed at verifying compliance with statutes or administrative regulations. *See, e.g.*, *Camara*, 387 U.S. at 535–38 (housing code inspection); *Donovan*, 452 U.S. at 599–605 (unannounced inspection of a mine for compliance with health and safety standards); *Michigan v. Tyler*, 436 U.S. 499, 507–09 (1978) (inspection of a fire-damaged premises to determine the cause of the fire).[2]

This Court has thus drawn a clear line distinguishing "administrative searches" from "traditional police searches conducted for the gathering of criminal evidence." *See Burger*, 482 U.S. at 699–700 (explaining that individuals and businesses owners have an expectation of privacy "not only with respect to traditional police searches conducted for the gathering of criminal evidence but also with respect to administrative inspections designed to enforce regulatory statutes"). This distinction is critical to identifying and enforcing the outer bounds of the exception—and thus the class of situations to which it may be applied. It also harkens back to the threshold requirement of a reduced expectation of privacy. Because an administrative search is not an effort to unearth evidence of suspected criminal behavior, it does not implicate the privacy concerns that a criminal search would, by necessity, call into question.

The Wisconsin Supreme Court plurality's application of the "pervasively regulated business" exception to support its holding here cannot be reconciled with

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[2] The Court has also upheld some warrantless "checkpoint" stops as constitutional under the administrative search exception but only when the stops were "suspicionless" and the "primary purpose" was distinguishable from "detect[ing] evidence of ordinary criminal wrongdoing." *Edmond*, 531 U.S. at 37–38.

the foundational principles on which the exception rests. The "pervasively regulated business" exception applies to searches for civil purposes, whereas the only purpose of the search at issue was to gather evidence of a suspected crime. And the search was certainly not "suspicionless"—to the contrary, it was wholly based on the arresting officer's individualized suspicion of a particular crime.

III. GENERAL LICENSING REQUIREMENTS AND DRIVING REGULATIONS DO NOT RISE TO THE LEVEL OF GOVERNMENTAL REGULATION NECESSARY TO TRIGGER THE "PERVASIVELY REGULATED BUSINESS" EXCEPTION.

As noted above, this Court has limited the application of the "pervasively regulated business" exception to businesses in four industries: (1) liquor sales, (2) firearms dealing, (3) mining, and (4) running an automobile junkyard. *See Patel*, 135 S. Ct. at 2454. And it has declined to extend the exception to hotel owners or all employers regulated by OSHA. *See id.* at 2456–57; *Marshall*, 436 U.S. at 324–25.

In circumscribing the reach of the exception, the Court has emphasized that mere licensing requirements and evidence of general regulations do not trigger its application, because, "[i]f such general regulations were sufficient to invoke the closely regulated industry exception, it would be hard to imagine a type of business that would not qualify." *Patel*, 135 S. Ct. at 2455. Rather, a distinct "comprehensive regulatory scheme" that puts the business owner on notice that his "property will be subject to periodic inspections undertaken for specific purposes" is required. *Burger*, 482 U.S. at 703.

For instance, in *Patel*, the Court declined to apply the "pervasively regulated business" exception to the hotel industry. 135 S. Ct. at 2455. The Court noted that, although hotels were subject to a variety of regulations regarding maintaining licenses, collecting taxes, conspicuously posting their rates, and meeting sanitary standards and that there was even a long history of laws obligating hotels to provide "suitable lodging" to paying guests, this "hodgepodge of regulations" did not constitute a "comprehensive [regulatory] scheme." *Id.* The Court characterized these regulations as "general regulations" that, if held sufficient to invoke the exception, would make it "hard to imagine a type of business that would not qualify" for the exception. *Id.* The Court emphasized that only a regulatory scheme that put hotel owners on notice that they would be subject to "periodic inspections undertaken for a specific purpose" would potentially trigger the exception. *Id.*

The Court has further explained that the history and extent of government oversight over industries that fall within this exception must be such that "when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of government regulation." *Marshall*, 436 U.S. at 313. Applying this principle, the Court in *Marshall* rejected a bid to extend the "pervasively regulated business" exception to all employment facilities subject to OSHA. 436 U.S. at 313–15. There, the Secretary of Labor argued that its agents should be permitted to conduct warrantless searches of any employment facility under the jurisdiction of OSHA pursuant to the exception because "all businesses involved in interstate commerce have long been subjected to close supervision of employee safety and health conditions." *Id.* at 313–14. The Secretary specifically pointed to minimum wage and maximum hours requirements to

support its claim that these businesses were "pervasively regulated." *Id.* at 314. Emphasizing the limited reach of the exception, the Court held that such regulations were neither sufficiently pervasive nor sufficiently longstanding to support applying the exception to virtually all American businesses. *Id.* at 313–15.

In the plurality opinion below, the Wisconsin Supreme Court effectively imposes on motorists the same burden placed on owners of pervasively regulated businesses. The court's unsupportable logic would extend to anyone who gets behind the wheel of a vehicle within Wisconsin's borders, regardless of where the driver resides or where the trip originated, based on "general regulations" akin to those this Court found in *Patel* and *Marshall* were insufficient to invoke the pervasively regulated business exception. To support its holding, the court cited Wisconsin's history of licensing requirements and general driving regulations and asserted that they were similar to the regulatory frameworks controlling "pervasively regulated businesses." But the regulations it relied on are much closer to those at issue in *Patel* and *Marshall*. They amount to some licensing requirements and a "hodgepodge" of general driving regulations, which is exactly what this Court held in *Patel* was insufficient. Further, if Wisconsin's driving regulations were sufficient, ***any*** state-licensed activity would be ripe for the same treatment, including, for example, the activities of doctors, lawyers, teachers, and hunters, just to name a few. All are subject to license requirements and general regulations. But those regulations—like the regulations applicable to drivers—do not implicate the unique circumstances the exception was created to address.

In addition, it bears noting that this Court has previously rejected an attempt to apply the reasoning

of the "pervasively regulated business" exception to motorists. *See Almeida-Sanchez v. United States,* 413 U.S. 266, 267–72 (1973). In *Almeida-Sanchez*, the government relied on the rationale for the "pervasively regulated business" exception to validate a warrantless, suspicionless search of an automobile by a roving patrol on a road that lies "at all points at least 20 miles north of the Mexican border" seeking illegal entrants into the United States. *Id.* While the search at issue in *Almeida-Sanchez* at least satisfied the requirement that it be suspicionless (unlike the search at issue here), the Court summarily dismissed the government's attempt to apply the rationale for the "pervasively regulated business" exception to motorists, noting that a motorist is not engaged in any "regulated or licensed business." *Id.* at 271.

Simply put, the "pervasively regulated business" exception and its rationale have no application to individuals or searches for criminal violations. The exception was developed for a unique situation involving a small subset of businesses in heavily-regulated industries and it permits only a specific type of inspection to enforce the civil regulations to which those businesses are subject.

IV. THE WISCONSIN SUPREME COURT MISCONSTRUED THE "CONSENT" AT ISSUE IN THE "PERVASIVELY REGULATED BUSINESS" EXCEPTION.

One last point bears brief mention. The Wisconsin Supreme Court plurality construed this Court's "pervasively regulated business" case law as holding that business owners subject to the exception voluntarily consented to administrative searches, thereby making such searches permissible. But that interpretation seriously misconstrues the Court's precedent in this area.

The legality of a warrantless search under the "pervasively regulated business" exception is not premised on the business owner's consent. Rather, administrative inspections are legal (or illegal) based on whether the regulatory scheme at issue complies with the requirements the Court has articulated for the exception to be properly applied. In other words, "the legality of the search depends not on consent but on the authority of a valid statute." *Biswell*, 406 U.S. at 315.

The "consent" that this Court has mentioned in its "pervasively regulated business" decisions is the business owner's voluntary choice to embark upon a business in a closely regulated industry. *Marshall*, 436 U.S. at 313. That "consent" has not been held to support a warrantless search under the "pervasively regulated business" exception and is not the sort of "consent" required to support a warrantless search to ferret out evidence of wrongdoing in a criminal investigation.

CONCLUSION

The judgment of the Wisconsin Supreme Court should be reversed.

Respectfully submitted,

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